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## **APPENDIX**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1967**

**No. 187**

**MENOMINEE TRIBE OF INDIANS, PETITIONER**

**vs.**

**UNITED STATES OF AMERICA, RESPONDENT**

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS**

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**PETITION FOR CERTIORARI FILED MAY 22, 1967  
CERTIORARI GRANTED OCTOBER 9, 1967**

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**APPENDIX A**  
**IN THE UNITED STATES COURT OF CLAIMS**

No. 339-65

Filed Sep. 30, 1965

THE MENOMINEE TRIBE OF INDIANS, suing on its own behalf and as the representative of its members, or their successors, as a class; and MENOMINEE ENTERPRISES, INC., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and GORDON DICKIE, JAMES FRECHETTE, JERRY GRIGNON, and GEORGE KENOTE, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians, or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and FIRST WISCONSIN TRUST COMPANY, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902;  
*Plaintiffs,*

*v.*

THE UNITED STATES OF AMERICA,  
*Defendant.*

**PETITION**

1. *Jurisdiction.* Plaintiffs file this petition pursuant to 28 U.S.C. § 1505, and 28 U.S.C. § 1491.

## 2. *Parties plaintiff.*

(a) *Tribe.* Plaintiff, the Menominee Tribe of Indians, is a recognized tribe of Indians which has existed since time immemorial, and which has always resided in the State of Wisconsin. As of 1961 it had 3,270 enrolled members.

(b) *Corporation.* Plaintiff, Menominee Enterprises, Inc., is a corporation incorporated under the laws of the State of Wisconsin pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902. The beneficial owners of all of the outstanding stock of Menominee Enterprises, Inc. are enrolled Menominee Indians, or their successors.

(c) *Individuals.* Plaintiffs, Gordon Dickie, James Frechette, Jerry Grignon and George Kenote, are all enrolled members of the Menominee Tribe and stockholders of Menominee Enterprises, Inc.

(d) *Trustee.* Plaintiff, First Wisconsin Trust Company, is a trust company bank, incorporated under the laws of the State of Wisconsin, and is the trustee of a trust known as the Menominee Assistance Trust, whose beneficiaries are enrolled Menominee Indians who are either minors, *non compos mentis*, or persons deemed by the Secretary of the Interior to be in need of assistance in managing their affairs.

3. *Previous Action on Claims.* Except as stated herein, no action has been taken by Congress or any department of the Government, or in any judicial proceeding, with respect to the claims herein set forth.

4. *Menominee Reservation.* The Menominee Reservation, where the Menominee Tribe and most of its members presently reside, was aboriginally owned by the Tribe, and was confirmed to the Tribe by the Treaty of Wolf River, May 12, 1854, 10 Stat. 1064. This reserva-

tion was never allotted, and remained wholly owned by the Tribe until conveyed in 1961 to Menominee Enterprises, Inc., by the Secretary of the Interior pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902.

5. (a) *Hunting and Fishing Rights.* Under the aforesaid Treaty of Wolf River, the United States guaranteed to the Menominee Tribe the right to hunt and fish within the reservation free of any restrictions by the state or federal governments. This right arose from the language in Article 2, whereby the United States "do hereby give, to said Indians for a home, to be held as Indian lands are held . . .", and the express understanding of the parties that the grant was to include hunting and fishing rights.

(b) The right was owned by the Menominee Tribe for the benefit of its members until the Menominee Termination Act became effective on April 29, 1961 (26 Fed. Reg. 3726), and thereafter it was owned by the individual enrolled Menominee Indians, or by the Menominee Tribe for the benefit of its members, or by Menominee Enterprises, Inc., for the benefit of its stockholders.

(c) The Menominee Tribe enjoyed and exercised the right until the Menominee Termination Act became effective on April 29, 1961. At that time, the State of Wisconsin has since ruled, the right was abrogated. *State v. Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41 (1963). The U.S. Supreme Court refused to review this ruling. *Sanapaw v. Wisconsin*, 377 U.S. 991 (1964), rehearing denied, 379 U.S. 871 (1964).

(d) Consequently, by virtue of the 1961 proclamation pursuant to the Menominee Termination Act, the Menominee Indians have been deprived of their valuable treaty right to hunt and fish on the Menominee Reservation free of federal or state regulation, and they now

have no greater hunting and fishing rights than non-Indians.

(e) The United States owes the plaintiffs just compensation for the abrogation of this treaty right.

WHEREFORE, Plaintiffs pray that judgment be entered against defendant in an amount which will provide just compensation for the loss of hunting and fishing rights, including interest or damages for delay in payment, and demand such other relief as the facts may warrant.

/s/ Charles A. Hobbs  
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## APPENDIX B

## IN THE UNITED STATES COURT OF CLAIMS

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No. 339-65(Decided April 14, 1967)

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THE MENOMINEE TRIBE OF INDIANS [et al.] v. THE  
UNITED STATES

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*Charles A. Hobbs*, attorney of record for plaintiffs.  
*Wilkerson, Cragun & Barker* and *Angelo A. Iadarola*, of  
counsel.

*Ralph A. Barney*, with whom was *Assistant Attorney  
General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS,  
COLLINS, SKELTON, and NICHOLS, *Judges*.

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ON PLAINTIFFS' AND DEFENDANT'S MOTIONS  
FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

The Menominee Tribe of Indians, suing on its own behalf and as the representative of its members, or their successors, as a class; and Menominee Enterprises, Inc., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and Gordon Dickie, James Frechette, Jerry Grignon, and George Kenote, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians,



or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and First Wisconsin Trust Company, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902 (1964), have filed this suit to collect damages from the Government for the alleged loss of hunting and fishing rights on their reservation in Wisconsin which they claim were abrogated and cancelled by the Menominee Termination Act of 1954, *supra*, passed by the Congress of the United States. They assert that this Act enabled the State of Wisconsin to impose its hunting, fishing, and conservation laws upon the members of the tribe living on the reservation and this has extinguished their right to hunt and fish on their land "untrammelled by any state law or regulation"; that this is a valuable property right and the Government should compensate them for its loss. They admit they have the right to hunt and fish on the reservation on the same basis as exists for any non-Indian landowner on his land, but they claim the right to be free of any state hunting and fishing laws. They say they should recover damages for the loss of this freedom.

The Government has challenged the jurisdiction of this court and contends that the Menominee Termination Act, *supra*, abolished the Menominee Tribe of Indians and that the plaintiffs are not entitled to maintain this suit in this court. We do not agree. It is clear from the wording of the various sections of the Termination Act itself that it was contemplated the Menominee tribe would continue in existence after the Act became effective. For instance, the Act provided procedure for setting up a final roll of the members of the tribe and after the roll was completed, certificates were to be issued by the tribe to the members whose names appeared on the roll. Furthermore, the in-

terest was to be alienable only in accordance with such regulations as may be adopted by the *tribe*. It provides further, that the Secretary of the Interior would transfer all tribal property to a trustee "for the benefit of the Menominee tribe." Finally, the Act states that after it becomes effective, the individual members of the *tribe* shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and all statutes of the United States applicable to Indians because of their status as Indians shall no longer be applicable to the members of the *tribe* and the laws of the several states shall apply to the *tribe* and its members and that nothing in the Act shall affect the status of the members of the *tribe* as citizens of the United States. The Termination Act did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the *tribe*. The Menominee Indians continue to constitute a *tribe* whose membership is composed of those persons whose names appear on the official roll of the *tribe* prepared in accordance with the terms of the Termination Act. The *tribe* continues to hold the beneficial and equitable interest in the property that was conveyed by the Secretary of Interior to plaintiffs, Menominee Enterprises, Inc., and First Wisconsin Trust Company, Trustees, in trust for the *tribe*. Certainly the Menominees constitute a "tribe, band, or other identifiable group of American Indians" within the meaning of the Indian Claims Commission Act of 1946, as amended, 28 U.S.C. § 1505 (1964), and they are asserting a claim in this case arising under the Treaty of 1854, *infra*, and the Termination Act, *supra*. Consequently, this court has jurisdiction of this case under the Indian Claims Commission Act, *supra*, and under the Tucker Act, 28 U.S.C. § 1491 (1964).



## I

The Menominee Indians have lived as a tribe since time immemorial in Wisconsin. They have made various treaties with the United States through the years, most of which have nothing to do with the present lawsuit. However, by way of background, we will point out that by the Treaty of St. Louis, 7 Stat. 153 (1817), they acknowledged themselves to be under the protection of the United States. The Treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundary questions, while by the Treaty of Washington, 7 Stat. 342 (1831), and 7 Stat. 405 (1832), they ceded 3 million acres to our Government. They ceded about 4,184,000 acres to the United States by the Treaty of Cedar Point, 7 Stat. 506 (1836), and in 1848, ceded the balance of their land of approximately 4 million acres by the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952, in exchange for about 600,000 acres west of the Mississippi River.

As a part of this last treaty and exchange, it was agreed that they could inspect the land west of the Mississippi before moving on it. They did so and reported dissatisfaction with it and refused to move to it. The Government then ceded them 276,480 acres of different land on Wolf River in Wisconsin which was acceptable to them and to which they moved in 1852.

In order to legalize this exchange of land, the Treaty of 1848 was amended by the Treaty of Wolf River, 10 Stat. 1064, 1065 (1854), by which the Menominees ceded back to the Government the lands west of the Mississippi which they had refused to accept and in return the Government gave to them the reservation on Wolf River "for a home, to be held as Indian lands are held, \* \* \*." No mention was made in this treaty or in the Treaty of 1848 about hunting or fishing rights.

Except for two small tracts ceded by the Menominees in 1856, for use by the New York Indians, 11 Stat. 679, the Wolf River Reservation of about 230,000 acres has remained intact as the Menominee Reservation to the present time. It was occupied and governed by them according to the customs, laws, rules and regulation of the tribe without any outside interference by the state or anyone else during the 100 years from 1854 to 1954. This freedom from outside regulation and interference during this period extended to and included their hunting and fishing on the reservation, which was controlled only by the rules and regulation of the tribe itself.

## II.

We will consider first whether or not the Menominees had exclusive and unregulated hunting and fishing rights on their Wolf River Reservation. While it may be that the Menominees could establish a claim to such hunting and fishing rights by Indian title acquired by their ancestors through use and occupancy of land in Wisconsin for a long time, which may have included the land in their present reservation, these facts are not before us and we cannot speculate with reference to them. Actually, it is not necessary for us to pass upon any aboriginal claim to hunting and fishing rights, because the Menominees do not contend that their rights in this case are based on aboriginal title at all. Rather, they pitch their claim squarely on the hunting and fishing rights which they assert were given to them by the Government in the Treaty of Wolf River in 1854, *supra*.

That Treaty, which created their present reservation, did not specifically or expressly mention hunting and fishing rights. Article 2 of the treaty (10 Stat. 1065) provided:

In consideration of the foregoing cession the United States agree to give, and do hereby give, to

said Indians for a home, to be held as Indian lands are held, [the land in question] \* \* \*.

The Menominees say that the language "to be held as Indian lands are held" grants them an unqualified right to hunt and fish on the reservation in their own way free from all outside regulation or control. We think they are right. Cf. *Oneida Tribe v. United States*, 165 Ct. Cl. 487, 490-91 (1964), cert. denied, 379 U.S. 946. *Moore v. United States*, 157 F. 2d 760 (9th Cir. 1946), cert. denied, 330 U.S. 827. The primary reason they accepted this reservation as their new home was that it was filled with all kinds of game. We so held in the case of *Menominee Tribe of Indians v. United States*, 95 Ct. Cl. 232, 240-41 (1941), where we said:

The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game. \* \* \*

\* \* \* part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty was the fact that the tract in question contained swamp lands which were suitable for hunting.

It should be remembered that at the time of the treaty in 1854, hunting and fishing was a way of life with the Menominees. They depended on it for their livelihood if not their very existence. It is inconceivable that a reservation would have been created for them at that time without giving them the exclusive right to hunt and fish. The Supreme Court in discussing fishing rights of Indians in the case of *United States v. Winans*, 198 U.S. 371, 381 (1905), stated that such rights are "not much less necessary to the existence of the Indians than the atmosphere they breathed." The same observation applies to their

hunting rights. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

The Supreme Court of Wisconsin in passing on the identical question before us in *Wisconsin v. Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41, 44 (1963), *cert. denied*, 377 U.S. 991 (1964), *rehearing denied*, 379 U.S. 871, said that if the 1854 treaty provision which ceded these lands to the Menominees "to be held as Indians lands are held" was ambiguous as to whether or not it included hunting and fishing rights, it should be interpreted in favor of the Indians, citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908). The court went on to say in the *Sanapaw* case:

\* \* \* Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty. *Ibid.*

We agree with the Supreme Court of Wisconsin that the 1854 treaty did grant exclusive hunting and fishing rights to the Menominees on their reservation free from the state's game laws. Furthermore, they enjoyed these exclusive rights for 100 years with the consent and acquiescence of the State of Wisconsin. We are supported in our decision by the cases of *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956), *Klamath & Modoc Tribes v. Maison*, (unreported, United States District Court for the District of Oregon, No. 8081 (1963)), and *Oregon v. Pearson* (unreported, District Court of Klamath County, Oregon, No. 61-792c (1961)). In those cases the treaty between the Government and the Klamath and Modoc Tribes and the Yahooskin Band of Snakes in 1864, did not mention hunting or trapping

rights on their reservation, but the courts held that the treaty granted them such rights by implication and that the Indians could hunt and trap on their reservation without restriction or control by the State of Oregon.

### III

We come now to the consideration of whether or not the Menominee Termination Act of 1954, *supra*, abrogated or cancelled the hunting and fishing rights of the Menominees on their reservation and thereby subjected them to the game laws of the State of Wisconsin on the same basis as if they were non-Indian citizens of the state. The Act did not mention hunting and fishing rights, but the Menominees point out that the Supreme Court of Wisconsin held in the case of *Wisconsin v. Sana-paw*, *supra*, that the following language in the Act cut off their unregulated hunting and fishing rights and made them subject to the game laws of Wisconsin:

SEC. 10. \* \* \* all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.* [Emphasis supplied.] 68 Stat. 252, 25 U.S.C. § 899 (1964).

Since there was no mention of hunting and fishing rights in the Act either by way of preservation or abrogation, we must look to the legislative history of the Act and to all of the facts and circumstances existing at the time of its passage, as well as at the time it was implemented and became effective, to determine if it cut off these rights by implication. *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 260 (1956).

The right to hunt and fish Indian fashion is a valuable property right. See *United States v. Winans*, *supra*; *The*



*Tlingit and Haida Indians of Alaska v. United States*, 147 Ct. Cl. 315, 177 F. Supp. 452 (1959). It should not be taken away by implication unless there is some cogent or compelling reason for doing so. This is in accord with the settled rule that repeals by implication are not favored and will not be held to have taken place if there is a reasonable construction, by which both the treaty and the statute can coexist consistently with the intention of Congress. *Ward v. Race Horse*, 163 U.S. 504, 511 (1896); *United States v. Zacks*, 375 U.S. 59, 67 (1963). See *United States v. Moore*, 62 F. Supp. 660, 667 (W. D. Wash. 1945), *aff'd*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947).

Turning to the legislative history, we find that the bill which was finally passed as the Termination Act, originated in the House of Representatives of the 83d Congress as H.R. 2828. There were two other bills, S. 2813 and H.R. 7135, on the same subject pending before the Congress at the same time. Both S. 2813 and H.R. 7135 provided for the preservation of the hunting and fishing rights the Menominees might have by treaty, statute, custom or judicial decision. H.R. 2828 was silent on the subject. At the hearings on the bills, two witnesses expressed their opinion that H.R. 2828 would not affect hunting and fishing rights acquired by *treaty* but would repeal such rights granted by *statute*. A third witness stated that he thought the bill by its silence would by implication abolish the tribal rights to exclusive hunting and fishing within the reservation.<sup>1</sup> The Congress enacted H.R. 2828 into law without any provision as to hunting and fishing rights. It is argued that Congress thus made a choice and cut off the exclusive hunting and fishing rights by implication. We do not agree.

<sup>1</sup> *Joint Hearings Before the Subcommittees of the Committees on further and Insular Affairs on S. 2813, H.R. 2828, and H.R. 7135*, 83d Cong., 2d Sess., pt. 6, at 588, 629, 697 (1954).

There was no need for the Congress to provide for the preservation of the hunting and fishing rights in the Termination Act for at least two reasons. In the first place, they were preserved and protected for the Menominees by another bill that was passed by the same 83d Congress and considered by the same committees of both houses. It was passed as an amendment to Public Law, 280, 18 U.S.C. § 1162 (1964), on August 24, 1954, only about two months after the Termination Act was passed on June 17, 1954, but over six years before the Termination Act became effective on April 30, 1961. Public Law 280 dealt with the extension of criminal jurisdiction of the State of Wisconsin over the Menominee Reservation and expressly reserved and protected the hunting and fishing rights of the Menominees in the following language:

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
--------------------------	-------------------------

\* \* \* \*

Wisconsin ..... All Indian country with the State.

(b) *Nothing in this section* shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is

subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. [Emphasis supplied.]

It is logical to assume that the Congress, acting through its committees that handled both bills, as well as by its own action as a whole, knew that hunting and fishing rights were being protected in Public Law 280 and there was no need to mention them in the Termination Act.<sup>2</sup>

Also, it should be pointed out that H.R. 7135 and S. 2813, which were the other two bills considered by Congress when H.R. 2828 (The Termination Act) was also considered, contained language practically identical to the language in Public Law 280 with reference to hunting and fishing rights. For instance, they both provided:

SEC. 15. Nothing contained in this Act shall deprive the tribe or its members of any rights, privileges, or immunity afforded by treaty, statute, custom, or judicial decision, to fish, hunt, trap, and harvest the products of nature or the control, licensing, or regulation thereof, except as may be agreed upon from time to time by the tribe and the State of

<sup>2</sup> It should be noted that the bill (H.R. 1063) which became Public Law 280 was introduced on January 6, 1953, and was passed on August 15, 1953. On February 9, 1953, approximately one month after the introduction of H.R. 1063, the bill (H.R. 2828) which was to ultimately become the Menominee Termination Act was introduced. It was passed on June 17, 1954. The Menominee Reservation was added to those lands subject to Public Law 280 pursuant to the amendment of August 24, 1954.



Wisconsin; \* \* \*. *Joint Hearings Before the Subcommittees of the Committees on Interior and Insular Affairs on S. 2813, H.R. 2828, and H.R. 7135, 83d Cong., 2d Sess., pt. 6, at 581, 583 (1954).*

Obviously, there was no need to protect the hunting and fishing rights in both the Termination Act and in Public Law 280 with almost the same phraseology. So, H.R. 2828 (The Termination Act) was passed without mention of such rights. But they were preserved in the Menominee Amendment to Public Law 280, which became law in 1954, almost seven years before the Termination Act became effective in 1961.

In the second place, it was unnecessary to preserve the hunting and fishing rights in the Termination Act because by the terms of the Act it was provided that the tribe would submit a plan to the Secretary of the Interior which:

SEC. 7. \* \* \* shall contain provision for protection of the forest on a sustained yield basis, and for the protection of the water, soil, fish and wildlife. 70 Stat. 549, 25 U.S.C. § 896 (1964).

The Act provided further that upon the submission of such a plan by the tribe and its approval by the Secretary of the Interior, he would issue a proclamation containing the plan and his approval thereof. The Termination Act would become effective upon the issuance and publication of the proclamation.

In due time, the tribe did submit such a plan to the Secretary of the Interior. It included a provision on law and order (which would include hunting and fishing) in the following language:

It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menomi-

nee Reservation having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U.S.C. 1162).<sup>3</sup>

By this language, the tribe referred to Public Law 280 and in effect made it a part of its plan by reference, thereby protecting and preserving its hunting and fishing rights in great detail. It is pertinent to observe at this point that the amendment to Public Law 280, which was to incorporate the Menominee Reservation within its provisions, was introduced at the request of the Menominee Indians. At the time Public Law 280 was enacted, the tribe had requested exemption because they felt their tribal law was sufficient. The tribe thereafter reconsidered its position and authorized its attorneys and its tribal delegates to seek the amendment referred to in April 1954, prior to passage of the Termination Act. The amendment was to "carry out the wishes of the tribe." S. REP. No. 2223, *United States Code Congressional and Administrative News*, 83d Cong., 2d Sess. 3171-72 (1954).

Certainly the Menominee Tribe did not feel that the Termination Act divested them of their unrestricted right to hunt and fish. Furthermore, in seeking the amendment which would extend the criminal jurisdiction of Wisconsin over the Menominee Reservation, excluding the regulation of hunting and fishing rights granted by treaty, it cannot be said that a sacrifice of these rights was at all contemplated. The plan was approved and the Proclamation was issued by the Secretary of the Interior, thereby making the Termination Act effective on the 30th day of April 1961. By this procedure, the provisions of Public Law 280 that preserved the hunting and fishing rights of the Menominees were included in and made a part of the Termination Act of 1954 by reference. This leads us to the inescapable conclusion that the Termination Act not only did not abrogate the exclusive hunting and fishing

<sup>3</sup>26 Fed. Reg. 3726, 3728 (1961).

rights of the Menominees on their own reservation, but actually preserved and protected them. Further supporting this view is the observation that a plan calling for the protection of fish and wildlife would hardly be necessary if state laws were to govern in those areas. See S. REP. No. 2412, 84th Cong., 2d Sess. 2 (1956), in which it is indicated that the Menominees would have no trouble formulating such a plan.

#### IV

We are mindful that this conclusion is different from the result reached by the majority of the Supreme Court of Wisconsin on the same question in the case of *Wisconsin v. Sanapaw, supra*, but it is in accord with the result of the dissenting opinion. In that case three Menominee Indians were charged in criminal complaints in the same case with hunting deer with the aid of an artificial light and with the transportation of a loaded and uncased gun in an automobile on the Menominee Reservation in violation of the game laws of the State of Wisconsin. The defendants pleaded not guilty but admitted, and the court found, that the alleged violations were, in fact, committed. The trial court, however, in an unreported written opinion found the defendants not guilty because they were enrolled members of the Menominee Indian tribe and the state had no jurisdiction to enforce its hunting and fishing regulations against them on the Menominee Reservation. It based its decision on the fact that the Treaty of 1854 granted the Menominee Indians the right to hunt and fish on their reservation free from regulation of the state game laws and that this right had been enjoyed by the Indians for over 100 years and that the Termination Act, *supra*, did not terminate such exclusive hunting and fishing rights. The state appealed the case to the Supreme Court of Wisconsin where the majority of the court reversed the decision of the trial court and held that the Menominee Termination Act abrogated the tribe's right

to be free of the state's game laws in hunting and fishing on its reservation. The case was remanded to the trial court for further proceedings in accordance with the opinion. The court based its decision solely on its interpretation of the words and language of the Act itself. While we think an opposite interpretation of the Act should be made, still, out of deference and respect for the Wisconsin Supreme Court, we will say that if that court could have had the benefit of all the facts and circumstances surrounding the contemporaneous consideration of Public Law 280, by the same Congress that passed the Termination Act, including the plan of the tribe incorporating a portion of Public Law 280 therein, and its approval by the Secretary of the Interior, in effect making such provisions of Public Law 280 a part of the Termination Act, the decision of that court might well have been different.

Our view is supported by the two decisions in *Klamath & Modoc Tribes v. Maison*, *supra*, and the case of *Oregon v. Pearson*, *supra*. In those cases, which we will refer to as the *Klamath* cases, the tribes had exclusive fishing rights on their reservation which were granted to them by the Treaty of October 14, 1864, 16 Stat. 707, 708 in connection with the creation of their reservation. The treaty provided:

\* \* \* and the exclusive right of taking fish in the streams and lakes, included in said reservation, \* \* \* is hereby secured to the Indians aforesaid: \* \* \*

Nothing was said in the treaty about hunting or trapping. On August 13, 1954, Congress passed the Klamath Termination Act, 68 Stat. 718, 25 U.S.C. §§ 564-64x (1964), which provided:

SEC. 14. \* \* \*

(b) Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty. *Id.* at 722.

Here again, nothing was said about hunting or trapping. However, it should be noted that this Termination Act contained the same general language as is contained in the Menominee Termination Act, which the Supreme Court of Wisconsin said in the *Sanapaw* case cut off the hunting and fishing rights of the Menominees, as follows:

SEC. 18. \* \* \* all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.* [Emphasis supplied.] 68 Stat. 722, 25 U.S.C. § 564q (1964).

In the *Klamath* cases certain Indians were charged with illegally hunting and trapping wild game on their reservation, contrary to the game laws of Oregon. This occurred after the Klamath Termination Act was passed. The same argument was made there (as here) that since there was no mention of hunting or trapping in either the treaty or the Termination Act, such rights, if they ever existed, were cut off by the Termination Act. It was argued that this was especially true since fishing rights were expressly preserved and that if Congress had intended to preserve hunting and trapping rights it would have said so in the Termination Act. But the courts in those cases disagreed with this argument and held that the Termination Act did not cut off the hunting and trapping rights of the tribe. They also held that such rights were specifically recognized by Congress in Public Law 280, and that the members of the tribe had a right to hunt and trap on the reservation without restrictions or control by the State of Oregon.

In the only reported case of the three referred to *infra*, the court concluded as follows:

\* \* \*



2. Public Law 280, 83d Cong., 67 Stat. 588, 18 U.S.C. § 1162, \* \* \* did not extend the hunting and trapping laws of the State of Oregon to the Klamath Indian Reservation. *Klamath & Modoc Tribes v. Maison*, *supra* at 637.

While the effect of Public Law 280 was specifically mentioned in *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956), no reference to the Klamath Termination Act was made. However, in the unreported *Klamath* case, dated December 10, 1963, the court retained jurisdiction over its previous decision rendered in 1956, and made reference to the Klamath Termination Act by stating that the remaining enrolled members of the tribe, pursuant to treaty, had the unrestricted right to hunt and trap upon their lands. It further expressed the view that withdrawn members of the tribe who continued to be members for purposes of tribal claims against the United States, pursuant to the Klamath Termination Act, had no such privileges. Thus, we have an implicit recognition that the remaining enrolled members of the tribe, subsequent to the effective date of the Klamath Termination Act, retained their right to hunt and trap upon their lands without restriction or control by the state. Furthermore, in *Oregon v. Pearson*, *supra*, the court expressly held that since the Klamath Termination Act did not specifically grant away the hunting and trapping rights, they were retained by the enrolled members without restriction by the State of Oregon.

These conclusions were supported by the Department of the Interior, acting through Glenn F. Emmons, Commissioner of the Bureau of Indian Affairs, when the Commissioner issued a memorandum dated July 2, 1956, on the subject of "Policy of the Bureau respecting the protection and preservation of Indian hunting and fishing rights in termination legislation." This memorandum states:

Following the policy laid down by the Congress in the enactment of the act of August 15, 1953 (67 Stat. 588; Public Law 280, 83d Cong.), the Bureau's policy will be to protect and preserve any right, privilege or immunity with respect to hunting, trapping or fishing afforded to any Indian or Indian group by Federal treaty, agreement or statute in the planning and execution of readjustment programs, including the seeking of legislation necessary to carry out such programs.

Section 2 of the act of August 15, 1953, *supra*, states the policy of the Congress concerning the protection and preservation of Indian hunting and fishing rights. It provides that nothing in the act shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty, agreement or statute with respect to hunting, trapping or fishing or the control, licensing or regulation thereof.

\* \* \*

The memorandum then mentioned the decision in *Klamath & Modoc Tribes v. Maison*, *supra*, with approval by stating that it would follow the interpretation of Public Law 280 as made by that case unless changed by other court decisions, saying:

It thus appears, from the only judicial interpretation of the act which has been made, that the intention of Congress was to preserve and protect both express and implied rights, privileges and immunities afforded under Federal treaties, agreements, or statutes with respects [sic] to hunting, trapping and fishing. This Bureau will accept the interpretation of the statute as made by the courts and lend such assistance as is possible in preserving and protecting hunting and fishing rights of the Indians.

\* \* \*

It thus appears that the Commissioner fully understood and agreed that Public Law 280 preserved and protected

hunting and fishing rights of Indians who were the subject of Termination Acts, such as the Menominees.

The question before us seems to have been laid to rest by the Supreme Court in the case of *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). In that case, Congress authorized the Secretary of the Interior in 1891, to prescribe rules and regulations governing the Metlakatla Reservation in Alaska. Acting under this authority, the Secretary issued regulations in 1951, allowing the Metlakatlas to use fish traps in the waters around their reservation. After Alaska became a state, it passed an anti-fish-trap law in 1959, and sought to enforce it against the Metlakatlas as to the waters surrounding their reservation. Mr. Justice Frankfurter, in speaking for the Supreme Court decided the case adversely to the state on the basis of Public Law 280 by saying:

In 1958, 72 Stat. 545, Alaska was added to the list of States and Territories permitted to exercise civil and criminal jurisdiction over Indian reservations. The State has not argued that this took away the power of the Secretary of the Interior to make regulations contrary to state law. Appellant has argued, to the contrary, that the statute expressly preserved Indian fishing rights from state laws. The statute granting States civil and criminal jurisdiction was passed in 1953, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. Subsection (b) of 18 U.S.C. § 1162 provides that nothing therein shall authorize alienation, encumbrance, or taxation of Indian property, "or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."



*This statute expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, but only those fishing rights and privileges given by federal treaty, agreement, or statute. [Emphasis supplied.]*  
*Id.* at 56.

Of course, fishing rights were emphasized in that case, but, obviously, if hunting or trapping right had been involved, the same result would have been reached as to them, since they are all treated together in Public Law 280. The Supreme Court upheld the right of the Metlakatlas to use fish traps in the waters around their reservation free from any interference by the fish-trap laws of the State of Alaska, thereby extending the protection of Public Law 280 to "regulations", in addition to "treaty, agreement or statute," although regulations are not mentioned in the statute.

When applied to the case before us, the holding of the Supreme Court in the *Metlakatla* case as quoted above, "This statute [Public Law 280] expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, \* \* \*," clearly recognizes and establishes the right of the Menominees to hunt and fish and trap on their reservation free from interference by the game laws of the State of Wisconsin.

## V

If the rights of the Menominees to hunt and fish on their reservation free from regulation by the state's game laws have been interfered with, it is due to the action of the State of Wisconsin acting through its Supreme Court and law enforcement officers and not because of any act of the United States. Consequently, any complaint they have on that score should be against the State of Wisconsin and not against the Federal Government. In extending the jurisdiction of its game laws over the Menominee

Reservation, Wisconsin was acting as a sovereign state wholly independent of any authority granted to it in this respect by the United States. In so doing, it was not an agent of the Federal Government and the Government is neither responsible nor liable for its improper acts. *Cf. D. R. Smalley & Sons v. United States*, Ct. Cl. No. 422-65, decided February 17, 1967.

It may be argued that the conflict between our holding in this case and the decision of the Supreme Court of Wisconsin in the *Sanapaw* case, *supra*, leaves the Menominee Indians in an impossible position. This does not necessarily follow. They have the same remedy, among others, that the Quillayute Tribe of Indians had in the case of *United States v. Moore*, 62 F. Supp. 660 (W.D. Wash. 1945), *aff'd*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947). There, an injunction suit was filed by the United States on behalf of the tribe to restrain state conservation officers, namely the Directors of Game and of Fisheries of the State of Washington, from enforcing the state's game laws on the Quillayute Indian Reservation. The trial court granted the injunction and decreed that the defendants were "permanently enjoined, restrained, and debarred from interfering in any manner with or asserting any jurisdiction or control whatsoever over fishing activities" of the tribal members on their reservation. *Id.* at 761.

On appeal the court held that in the creation of the reservation "sufficient for their [the Indians] wants" the United States preserved the area in controversy for the exclusive use of the Indians and it was not subject to the fish and game laws of the state. *Id.* at 763-64.

## VI

In summary, we hold: (1) the Treaty of Wolf River in 1854 granted exclusive hunting and fishing rights to the Menominees on their reservation free from outside regu-

lation; (2) the Menominee Termination Act of 1954 did not abrogate or cut off such hunting and fishing rights, and even though the Supreme Court of Wisconsin erroneously, in our opinion, construed the Act to terminate such rights, this does not create liability against the United States; (3) the Menominees, therefore, who are enrolled as members of the tribe on its records in accordance with the Termination Act, have, own and possess at the present time the exclusive right to hunt and fish on their reservation free from restriction, regulation, or control by the State of Wisconsin; and (4) the petition of the Menominees, having failed to state a cause of action against the United States, is hereby dismissed.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

DURFEE, *Judge*, dissenting:

In *Wisconsin v. Sanapaw et al.* 21 Wis. 2d 377, 124 N.W. 2d 41 (1963), *cert. denied*, 377 U.S. 991 (1964), *rehearing denied*, 379 U.S. 871 (1964), the Wisconsin Supreme Court held that Congress by its enactment of Section 10 of the Menominee Termination Act of 1954 ended plaintiff's unregulated hunting and fishing and brought them within the purview of the state's game laws. See 68 Stat. 250, 25 U.S.C. § 899 (1964). The state court found that the state's asserted regulation of the Indians was derivative of Federal statutes and that the Indians had no claim against the state. The majority of our court now recedes the reverse; that is, that the Termination Act "did not abrogate the exclusive hunting and fishing rights of the Menominees on their own reservation, but actually preserved and protected them." The court means that any future complaint by the Indians for violation of their hunting and fishing rights is against the State of Wisconsin and not the Federal government. Each court has told the Indians that they have rights, but not in

the deciding court. Thus, the Indians have won both contests, but each time on the wrong playing field and against the wrong opposition.

This court's decision leaves plaintiffs in a state of legal weightlessness. While each court has held that the other court's government is responsible for plaintiffs' condition, neither is able to enforce its finding. The Wisconsin Supreme Court cannot make the Federal government compensate the Indians. And this court is unable to stop Wisconsin's enforcement of state game laws, even though we say the Indians are not subject thereto. Thus, if there is no appeal of this court's decision, plaintiffs may never have their dilemma effectively resolved. Their situation will not be the common one of the party who finds himself with conflicting decisions in several Federal circuit courts. Rather it will be akin to the situation of Alphonse and Gaston where two courts tell each other that any further resolution of the dilemma belongs to the other's docket. The result is that neither court takes further action, and the Menominee Indian who tries to exercise his ancient hunting and fishing rights on his own reservation winds up in jail.

The predicament of plaintiffs does not have to remain insolvable. The majority opinion presents one solution. It recommends that plaintiffs seek, in a Federal district court, an injunction against the State of Wisconsin preventing it from enforcing its game laws. This suggestion is fraught with drawbacks; the most minor one being the possibility that the injunction will not be granted. Of major consequence are the difficulties connected with Federal action against state officials in the functioning of their duties. It suffices to say that the problems arising out of *Ex Parte Young* 209 U.S. 123 (1908) and its progeny make me very chary of Federal injunctions issued against state functions. See, generally, Hart & Wechsler, *The Federal Courts and the Federal System* 814-890;

*Developments in the Law—Injunctions* 78 Harv. L. Rev. 994, 1045 (1965); Wright, *Federal Courts*, 348. Cf. *Martin v. Creasy*, 360 U.S. 219 (1959).<sup>1</sup>

A more obvious solution to plaintiffs' difficulties would be a grant of certiorari by the Supreme Court and a resolution of the conflict between the state and Federal courts' decisions. However, the United States Supreme Court has already denied certiorari in the Wisconsin Supreme Court Indian case, and in the *Klamath Indian* case cited by the majority herein to the same effect as our present opinion.

In situations like this, at least two other approaches—comity and certification—are available to assist in resolving the Indians' predicament. These legal vehicles contain a greater degree of certainty than either certiorari or injunction. For, with them, the resolution of the conflict between the courts is not left to a later court's acts, but is handled while the case is still within this court's jurisdiction. Even though the conflict between the courts would be resolved in this court, neither of the two additional approaches require as thorough handling of the merits of the case as the majority does. Thus by doing less in the handling of the case, this court could do more to resolve plaintiffs' situation.

The first of these approaches—comity—would mean the acceptance by this court of the decision of the Wisconsin Supreme Court. Acceptance of the state court's decision does not mean that the process is automatic, that there is no inspection of either the present case or the state's

<sup>1</sup> The problems in this area were passed over without comment by the court in *United States v. Moore*, 62 F. Supp. 660 (W.D. Wash. 1945); *aff'd*, 157 F. 2d 760 (9 Cir. 1946); *cert. denied*, 330 U.S. 827 (1947, the case cited by the majority to support the suggestion of an injunction. In that case, plaintiff requested an injunction.

After holding for plaintiff on the law, the court decided that it should grant plaintiff's request.



decision. That approach would relegate the court to being a mere rubber stamp or a judicial conduit. Not only would that possibility saddle the court with an unsound decision, but also it would mean an abdication of duty. In this case, the thought of comity should not arise until one believes that he is not without doubt on the question of whether or not the Menominee Termination Act cancelled hunting and fishing rights of the Indians. The next step is to inspect the state court decision to see if it is reasonably derived. With a positive answer to this inspection, one would use comity and leave the final resolution to a higher court. *Mast, Foos & Company v. Stover Manufacturing Company*, 177 U.S. 485, 488-89 (1900); *Sanitary Refrigerator Company v. Winters, et al.* 280 U.S. 30, 35 (1929).

The second approach available to courts whose resolution of an issue is not fixed is the seldom used process of certification. Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 Va. L. Rev. 1, 46-50 (1949). 28 U.S.C. § 1255 (2) provides that "[c]ases in the Court of Claims may be reviewed by the Supreme Court \* \* \* [b]y certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon certification the Supreme Court may give binding instruction on such question." The sporadic use of certification is not due to its lack of success. For, when used, it has been beneficially employed. See *Williams v. United States*, 289 U.S. 553 (1933) and *O'Donoghue v. United States*, 289 U.S. 516 (1933) (both certifications from the Court of Claims). Use of certification in this case should not augment the fears held by many that an extensive use of this right could unduly enlarge the Supreme Court's obligatory jurisdiction. This is not the case where a court is trying to conceal an obligatory appeal in another guise. There is no wolf in sheep's clothing. Certification is put forth

so that this court could make every possible effort to arrive at a sound adjudication of a case that presents a troubling issue of law augmented by the possibility of a never-solved conflict between Federal and state courts that would deprive plaintiffs of a final, meaningful resolution of their suit. The Menominees are either entitled to their hunting and fishing rights under the Treaty or they are entitled to damages because these rights have been taken away, and certification would guarantee one of these decisions and not a meaningless hybrid.

Between comity and certification, I favor the latter approach because it seeks guidance from a higher court rather than looks backwards to a lower court as comity does. Therefore, rather than reach a decision on the merits of the case at this time, I would have certified the following question to the Supreme Court: Did the Menominee Termination Act of 1954 cancel the hunting and fishing rights of plaintiffs on their reservation and thereby subject them to the game laws of the State of Wisconsin as if they were non-Indian citizens of the state?

The history of the Menominee Tribe does not read well for the conduct of the United States. Again and again the Tribe has had to sue the Federal government in this court to recover damages to which they were entitled. Recently, a committee of the Congress referred to this court as "the keeper of the nation's conscience." If the court is to continue to deserve this title, we must now see to it that before the Federal government finally closes its books on the old Menominee Tribe, the last page is written with honest justice for them and for their rights.

LARAMORE and COLLINS, *Judges*, join in the foregoing dissent.

## APPENDIX C

## TREATY OF MAY 12, 1854 (10 Stat. 1064)

*Articles of agreement made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, superintendent of Indian affairs, duly authorized thereto, and the Menominee tribe of Indians, by the chiefs, headmen, and warriors of said tribe—such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight.*

Whereas, among other provisions contained in the treaty in the caption mentioned, it is stipulated that for and in consideration of all the lands owned by the Menominees, in the State of Wisconsin, wherever situated, the United States should give them all that country or tract of land ceded by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of the second of August, eighteen hundred and forty-seven, and by the Pillager band of Chippewa Indians in the treaty of the twenty-first of August, eighteen hundred and forty-seven, which had not been assigned to the Winnebagoes, guaranteed not to contain less than six hundred thousand acres; . . .

And whereas, upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, upon Crow Wing, which had been assigned them, and a desire to remain, in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers.

Now, therefore, to render practicable and stipulated payments herein recited, and to make exchange of the lands given west of the Mississippi for those desired by



the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into.

ARTICLE 1. The said Menominee tribe agree to cede, and do hereby cede, sell, and relinquish to the United States, all the lands assigned to them under the treaty of the eighteenth of October, eighteen hundred and forty-eight.

ARTICLE 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being township 28, 29, and 30, of ranges 13, 14, 15, and 16, according to the public surveys.

\* \* \* \*

In testimony whereof, the said Francis Huebschmann, superintendent as aforesaid, and the chiefs, headmen and warriors of the said Menominee tribe, have hereunto set their hands and seals, at the place and on the day and year aforesaid.

Francis Huebschmann, [L. S.]  
Superintendent of Indian affairs.

## APPENDIX D

MENOMINEE TERMINATION ACT OF 1954,  
AS AMENDED (25 U.S.C. §§ 891-902)

## § 891. Purpose

The purpose of sections 891-902 of this title is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.

\* \* \* \*

## § 893. Membership roll; closure; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: . . . When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe.

\* \* \* \*

**§ 896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register**

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. . . . The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. . . .

**§ 897. Transfer of property**

On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. . . .

**§ 899. Publication of proclamation of transfer of property; termination of Federal services; application of Federal and State laws; citizenship status unaffected**

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of the status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States. . . .

\* \* \* \*

## APPENDIX E

DECISION OF THE SHAWANO-MENOMINEE  
COUNTY COURT, BRANCH NO. 2,  
MENOMINEE COUNTY DIVISION

November 1, 1962

The issues of this case are very clearly drawn. It is the contention of the state as outlined in the opinion of the Attorney General and oral argument by District Attorney Fritz Eberlein of Shawano-Menominee County,

(1) That the right of hunting and fishing were not granted and not included in the treaties of 1854 and 1856.

(2) That Congress has plenary powers to deal with the Indians and may abrogate Indian privileges and rights, including treaty rights, by statute. Further that the lands here involved are part of the public domain.

(3) That Public Law 399 and supplementary acts terminate the hunting and fishing privileges heretofore enjoyed by Menominee Indians within what was formerly the Menominee Indian Reservation, now Menominee County.

The defense contends,

(1) That the treaty of 1854 provides that the lands are to be held as Indian lands are held.

(2) That the treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.

(3) That the termination act (assuming that Congress had the right to terminate hunting and fishing privileges) did not by its terms so provide. That the tribe according to the act still exists as such and likewise all lands and property of the tribe is now held by the enrolled members



of the tribe as the only stockholders of the Menominee Enterprises, Incorporated, who according to the act were the designated recipients by the tribe. That the members of the tribe have the right to quietly enjoy hunting and fishing and dwelling thereon free from molestation from the United States and it follows that the State of Wisconsin lacks jurisdiction to enforce the hunting and fishing laws in Menominee County.

The briefs and opinion submitted are exhaustive and complete as to adjudication of somewhat similar issues in both federal and some state courts. The facts of this case present issues not definitely passed on by our courts.

The court is of the opinion that it is apropos to the issues herein to discuss the historic background.

It seems that all lands on this planet suitable for habitation and survival was occupied by certain ethnic groups. Curiosity and a means of travel resulted in what history has called discovery of new continents. If the Indians of North America had landed in Europe it no doubt would have been called an invasion. Columbus in a rather touching ceremony took possession of some islands in the West Indies for Queen Isabell of Spain. Some gold was brought back to Spain and then the disease of discovery spread. France got into Canada and the Northwest Territory and later what was called the Louisiana Purchase. Spain took possession of Cuba and various areas in South America and what is now known as Florida. England staked out claims on the North American continent from Maine to Florida. The Dutch obtained a rather uncertain rights in New York and made history by purchasing Manhattan Island for the sum of \$24. At the times of the various nations above referred to attempted to take possession and colonize their respective areas of the North America continent and subsequent thereto it was apparent that practically the entire North American continent was occupied by aborigines, later called Indians. It is true that the

population and occupancy of the continent was not dense, but the fact did remain that there was a consistent occupation of all areas; that there were areas between the varying tribes, and there were many of different size and numbers, which area was more or less fought about and disputed by the Indians for hunting and fishing grounds, but that the pattern of occupancy was more or less consistent and that they regarded certain areas as their own private domain and at that time and subsequently thereto maintained that they had the title to said lands and the inherent right of hunting and fishing, which with some slight agriculture was their means of livelihood. The seaboard colonization proceeded rapidly until the time of the American Revolution which determined the colonies as an independent nation. Colonization and possession of lands for use of settlers proceeded systematically and fundamentally by power and strength of what we might call the colonist invaders. Firearms, of course, played a very important part. History indicates that William Penn recognized the title of the Indians and did negotiate a purchase. At this point it could be well remembered that purchasing the land from the Indians in reality meant nothing. What few dollars or goods that were paid was a poor substitute for the loss of their lands and in no way changed their method of life. It might be pointed out merely for the basis of comparison that the European countries colonizing Africa and staking out claims thereon were not as successful as in their occupancy of the North American continent, primarily perhaps because of the density of population in the African area, and we today see these countries withdrawing and leaving the title and possession of the claimed land entirely in the hands and under the control of the inhabitants of the respective areas.

After the Revolutionary War the expansion of settlers to the West, part by natural increase and others by immigration spread most rapidly west to the Mississippi River,

and we might point out that colonization or expansion by movement of settlers took possession of what lands or locations they wanted independent of claims of title thereto on the part of Indians. It was somewhat prior to 1848, which date Wisconsin was admitted to the Union, that specific issues between Indians and White settlers and the United States Government took a marked change as to rights. We are now to the point where Indians are displaying a certain type of anxiety, desire of maintenance of rights to the land so that there were issues which could no longer be passed because of the insistence on the part of the Indians and the potential threat of possible bloodshed where settlers were moving in on definitely proclaimed Indian lands.

The Memoninee Indians at this time were definitely located in Wisconsin, and from what transpired it is very apparent that the Menominee Indian chiefs fully recognized the problem and were more or less compelled to negotiate a treaty, and it must be very apparent that at this time the Menominee chiefs recognized what had transpired from the Atlantic seaboard to the Mississippi River, and that unless they could negotiate some suitable agreement that they would be pushed out of the Wisconsin area, which to them was an exceptional area for wildlife, fish and fertility of soil.

History does not record the respective details of the transaction though there is enough in written nature to understand the background and motives of the bargaining that took place.

It must be remembered that the expansion from the Allegheny Mountains to the Mississippi River was fraught with many encounters, claims and counterclaims, and the occupation by might, and that the government during this time became more and more and more alert to the necessity of allocations of tribes to certain areas, and from the Indian viewpoint at the conference table it made survival

a way of life and that the area to which they were to be concentrated or moved to must be sufficiently prolific to provide for their sustenance. It is fair to assume that the treaty contracting parties were aligned, one with the background of power and force, and the other with a plea for protection from enemies and opportunity to maintain their way of life.

A treaty was drawn, and it must be remembered, also, that in the Indian's mind had been built up a picture of the great White Father at Washington who in all matters according to Indian lore and mind was the essence of fairness and right. Just what in substance was the contract or treaty between the contracting parties? On the one hand the Indians released or quit claimed or gave warranty deed according to their custom to the federal government of millions of acres of land. How much of the State of Wisconsin has not been disclosed, but it is only fair to assume that many million acres were included, for which in return they were to receive a tract of land of some six hundred thousand acres. According to records the government attempted to give them land across the Mississippi. This held up the transaction because of inspection on the part of Indians, and it was disclosed after examination that that was entirely unsuitable for Indians purposes and livelihood, and that the government agreed to protect them from their enemies and protect them in their right and claim to this land. It was theirs before the treaty but by the treaty the government guaranteed it to them as against all others and agreed to hold it in trust, they to act as guardian or trustee, the Indians to be wards of the government, the government to supervise and no doubt assist as has later proved to be the policy that must have been the outgrowth of the government's obligations under the treaty.

It is obvious that the government negotiated from a power-laden hand and if the transaction were to be re-

garded on a mutual monetary basis it would seem that the Indians were substantially short-changed. The lands that the government received was promptly a part of the public domain and was deposed by the government as such. It would appear that the land reserved which is now Menominee County never became a part of the public domain. It would, also, appear as progress and changes in life and methods of living proceeded through the years that the Indians became a problem and that the government had to assist more than was originally anticipated and that the Indian's way of life could not entirely support him and it became quite costly for the government to continue the supervision agreed upon, and now the picture has definitely changed to the point that the government acting through its Congress was hopeful to unload their responsibilities; and again at the so-called conference table Public Act 399 resulted in what may be called another treaty with the Indians. The act speaks for itself. In reading it and the foregoing resolutions before the act was passed indicate that hunting and fishing privileges and the Indian way of life were calculatingly omitted. To the Indian today it appears that the government drove a sharp bargain or was trying to enlarge the benefits for other Wisconsin citizens by permitting others to enjoy the hunting and fishing privileges. It is this point that brings to a crisis that issue.

Shortly after the 1848 period as settlers consistently and persistently moved westward across the Mississippi the Indians in the West recognized the slow and deadly push resulting in loss of hunting grounds and a forced change into a way of life that we find open rebellion, antagonism and the Indians in conflict attempting to maintain their rights and title. Teddy Roosevelt in his famous book *THE WINNING OF THE WEST* does not correctly portray the one-sided conflict in which power and the authority and the decisions of the government were maintained by force; resulting in considerable blood-



shed but with the victory on the part of the government and the Indian now trying in various areas to recoup financially what he lost territorially.

In dealing with the problem from its very origin to date it, of course, was the Congress that set the pace by legislation. Originally Indian problems were solved by treaty. As we understand a treaty it is a formal agreement between two or more nations relating to peace, alliance, trade, etc. Contract generally speaking may be broken by either party but the party so doing can naturally be held in damages that result from a breach.

Congress determined that Indian matters would be handled by acts of Congress. Future treaties were out, but existing treaties should be inviolate unless changed by mutual consent. In this way no longer were Indian tribes treated as individual nations, but rather as American subjects entirely dependent on the grace of the fairness of Congressional action. So it became a government by statute covering Indian problems. The courts seem to have sustained this view in a certain respect as some of the decisions indicate that Congress had the plenary power over Indians and Indian lands. To this court it looks as if Congress grasped the crown and maintained its position by this method of power and that all supervision, privileges, rights were entirely within the grace of Congress. If this is the correct theory and right of procedure it would seem that the only saving grace for the Menominee tribe and their reservation is that their treaty is inviolate and that their rights to the Menominee Reservation, now Menominee County, arises from said treaty and cannot be changed without their consent nor by any unilateral act of the Congress. This position the courts have approved as indicated in decisions hereinafter referred to.

The position of the state and the defense are practically at direct variance. In the supplemental opinion or

brief of the Attorney General it is seriously contended that the entire issue revolves around the fact that the Menominee Reservation prior to the treaty hereinbefore referred to was part of the public domain and that the state's position rests firmly on this ground. Let's view this position in the atmosphere and facts surrounding the treaty of the government with the Menominees. It does not specifically appear from the evidence in this case whether the Menominee Reservation so to speak was included in the grant from the tribe to the government. Nor is the court able to determine whether the state's position is that it was included in the treaty but because of the delay of two years in selecting a proper location satisfactory to the Indians that the Menominee Reservation during that interim became a part of the public domain. It appears to this court without even the slightest of doubt, first, that the title to the Reservation originally vested in the Indians and that the essence without even a serious doubt of the treaty entered into contemplated and intended that even if the lands were granted to the government the government returned them with the incident of hunting and fishing included. Any other view of what transpired is inconsistent with all the factual bargaining and understanding between the parties. It was definitely understood that the Indians were to receive the right and title in the same absolute position as they originally held it. Their way of life, hunting, fishing and limited tilling of the soil, was the entire essence of the treaty, the government guaranteeing this and, also, agreeing to protect them from enemies and to supervise them.

It would be unworthy of our government to take any other position. It must, also, be remembered that since the creation of the reservation up to the date of termination the Indians exercised the complete right of supervising their own hunting and fishing regulations without regulation or prohibition of any kind on the part

of the government. At this point we wish to point out for whatever it is reasonably worth that the Menominee lands were designated as the Menominee Indian Reservation. The very term "reservation" indicates that it was land reserved by them for their use.

The Indians never having, therefore, granted away their inherent aboriginal right of hunting and fishing therefore still possess those rights, not only up to the time of termination but as we will conclude later even after termination. Authority for this position is well-founded in the treaty itself and several decisions of both the United States and state courts. While there are many others that touch upon this right, perhaps the most important first is a provision in the Treaty of 1854. Article 2, provides as follows:

"In consideration of the foregoing cession the United States agrees to give, and do give the said Indians for a home, to be held as Indian lands are held that tract of Country lying upon the Wolf River in the State of Wisconsin."

The 1854 treaty then designated a "reservation" for them "to be held as Indian lands are held." Thus, the Menominee Tribe has continuously exercised the exclusive and unlimited hunting and fishing rights in question. The 1854 treaty being characterized by the parties as "supplementary and amendatory to the treaty" of 1848, merges the treaty of 1848 so that there is no proper basis for saying that the tribe ever did actually lose its rights in the land ceded.

The fact that no express retention or grant of exclusive and unlimited hunting and fishing was set forth in either treaty does not alter the conclusion, this principle was well stated by the solicitor of the Department of Interior as follows.

"The examination of various treaties between the United States and the Chippewa Indians disclosed that while the right of the Indian to hunt and to fish on ceded land was reserved in some of the earlier treaties . . . no reservation of the right to hunt and to fish was made with respect to the uncaded lands of the Red Lake Reservation, but such a reservation was not necessary to preserve the right of the lands reserved or retained in Indian ownership. *The right to hunt and to fish was a part of the larger rights possessed by the Indians in the land used and occupied by them.*"

Such right was, "*not much less necessary to the Indian and his existence than the atmosphere they breathed remained in them unless granted away,*" United States vs. Winans, 198 United States 371, (OP., Acting Sol. IDM 28107, June 30, 1936).

The United States Supreme Court stated in United States vs. Winans, 198 United States 371, 381 (1905),

"The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians . . . the reservation where in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein they imposed a servitude upon every piece of land as though described therein and the right was intended to be continuing against the United States and its grantee as well as against the State and its grantee."

The Supreme Court of the State of Wisconsin in a case involving the Chippewas cited as State vs. Johnson, 212 Wis. 301; 249 N. W. 285, held as follows:

"While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they theretofore enjoyed we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights

with respect to the lands reserved to them at the time the treaty of 1854 was entered into and was not a shadow of impediment upon the hunting rights of the Indians on the lands retained by them, *The Treaty was not a grant of rights to the Indians but a grant of rights from them*, a reservation of those not granted. (U. S. v. Winans, 198 U. S. 371, 25 S. Ct. 662, 664; 49 L. Ed. 1089) We entertained no doubt the rights of Indians to hunt and fish upon their lands continued."

We will now consider whether the termination act, Public Law 399 and the subsequent amendments thereto, in any way limits the rights of the tribe as to their hunting and fishing privileges. It is the opinion of the court, first, that the Congress did not have a right to terminate or change the rights obtained by treaty. But if this opinion is differed with, may we point out that the act is strangely silent and neither directly or indirectly according to a fair interpretation of that act are the hunting and fishing privileges terminated. The preamble of the act provides,

"The purpose of this act is to provide for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."

Section 7 reads in part as follows,

"... the responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof because of their status as Indians, shall cease on December 31, 1960 or on such earlier date as may be agreed upon by the tribe and by the secretary. The termination plan shall contain provisions for protection of the forest on a sustained yield basis and for the protection of water, soil, fish and wildlife."



The provisions of Section 7 providing that the termination plan shall contain provisions for the protection of the forest on a sustained yield and for the protection of water, soil, fish and wildlife, definitely indicates that soil, fish and wildlife are to be protected or reserved and this definitely indicates that this was considered and it naturally follows that it must be for the benefit of the tribe.

Section 8 directs that the Secretary of the Interior to transfer to the tribe the title to all property real or personal that is held in trust by the United States for the tribe, and specifically authorized the formation of a corporation for the purpose of taking title to all tribal lands and assets and enterprises owned by the tribe or held in trust by the United States.

The termination act did not eliminate exclusive hunting and fishing rights owned by the Menominees under the treaties of 1848 and 1854.

By termination the government saved the cost of supervision and so forth. This became a costly and serious obligation as time went along under the terms of the treaty. The termination on the part of the government is based not alone to obviate the costs of supervision, but also on the factual assumption that in today's modern way of living they are self-sustaining, that during years of supervision the government has so advanced and prepared them.

Almost any day in this court the silent tragedy continues. Young Indians, both male and female, and even the older ones with no employment supplement the modern way of life by theft and pawing. Fiscal aid by the government since termination is self-evident that the termination was premature. Hunting and fishing is not in itself a sufficient supplement to the modern way of life, but it does help.

The right of hunting and fishing is more important and vital to the Menominee than the right of all of Wisconsin or United States citizens to invade it.

The termination act provides in substance among other things that the property be conveyed or assigned as agreed on by the Menominees. Actually a corporation was formed designated as Menominee Enterprises, Inc., its stockholders being the enrolled members of the tribe at the time that the rolls were officially closed. The reservation therefore, was not actually allotted but it is still owned by the tribe. This mere conveyance is not a conveyance to a third party but to the Indians themselves. It should, also, be noted that there is provided in the act a way of life for the Indians by provision that the property be operated on a sustained yield. The other way of life, namely by hunting and fishing, is not in any way referred to. But the inclusion of the sustained yield is indicative that the termination act was intended to solidify the tribe in their holdings and in their use. We must, therefore, conclude that the termination act in no way terminated the hunting and fishing rights that are now at issue in this case.

As we have heretofore pointed out this issue has been the subject of controversy, litigation and decision on the part of both state and federal courts. One of the most recent decisions which this court feels embodies the facts and the principles of law involved is the case of the State of Oregon vs. Harry Pearson determined in the District Court of the State of Oregon for the County of Klamath. The defendant was accused of illegal possession of deer meat in the County of Klamath within the area formerly known as the Klamath Indian Reservation without having obtained a deer tag for the possession thereof. Quoting from the opinion as follows:

"The question was whether the individual Indians who were members of the Klamath and Modoc Tribes

and Yahooskin Band of Snake Indians, hereafter referred to as the Klamath Indians, retain the right to hunt subsequent to the Klamath Termination Act as amended. (Title 25 U. S. C. A. 564).

"In aboriginal times up to the coming of the white man and through the period of recorded history, the Indians known as Klamath and Modoc Tribes and the Yahooskin Band of Snakes, as Individuals possessed, according to their culture, a large portion of the states of Oregon and California and the right to hunt without restriction or control except that imposed by themselves was included in such possessions, according to their culture. The right to hunt was a substantial portion of their subsistence, and inured to succeeding generations up to and including the period following the treaty of 1864 and was practiced by members of the reservation up to the present time."

In the opinion the court quoted extensively the decision of State of Wisconsin vs. Johnson, 212 Wis. 301. Also the United States vs. Winans, and the court's concluding opinion is as follows,

"The case of United States vs. Winans and the above mentioned case both sustained the theory which this Court adopts that right or duties imposed on the Indians herein were not grants to them but from them to the government; therefore, that they have not granted away they still possess and any substantial right or possession, such as hunting, cannot be taken away by implication. Since the Klamath Termination Act as amended did not specifically provide for a grant away of the hunting and trapping rights with due and proper consideration therefore, it is the conclusion of this Court that they are still retained by the enrolled members only and they can exercise their heritage to hunt and trap within the areas of the former existing Klamath reservation without restriction by the State of Oregon."

In accordance with the foregoing opinions this court is of the opinion that the State of Wisconsin is without jurisdiction and that the defendants are not guilty of the crimes charged. Formal motion for dismissal and discharge of the defendants will be heard November 8, 1962, at 2:30 p.m.

Dated: November 1, 1962.

BY THE COURT:

R. H. FISCHER  
County Judge

## APPENDIX F

DECISION OF THE SUPREME COURT OF  
THE STATE OF WISCONSIN

November 1, 1963

ERROR to review two judgments of the county court of Shawano-Menominee counties: R. H. FISCHER, Judge. *Reversed.*

Criminal prosecutions by the state against defendants Joseph L. Sanapaw, William J. Grignon, and Francis Basina for violation of certain game laws.

The actions were commenced by complaint and warrant. Sanapaw and Grignon were charged together in one complaint, while Basina was charged singly in a separate complaint. All three were charged with hunting deer with the aid of an artificial light in violation of sec. WCD 10.10 (2), Wis. Adm. Code, and with transportation of a loaded and uncased gun in an automobile in violation of sec. WCD 10.07 (3), Wis. Adm. Code. Sanapaw and Grignon were charged with having committed their offenses on September 8, 1962, and Basina was charged with having committed his on September 9, 1962. Pleas of not guilty were entered. Defendants admitted, and the court found, that the alleged violations were in fact committed. The court, however, found defendants not guilty because they were enrolled members of the Menominee Indian Tribe and the state had no jurisdiction to enforce its hunting and fishing regulations against them.

The Court, pursuant to sec. 958.12 (1) (d), Stats., granted the state permission to prosecute writs of error to review the judgments of acquittal. By agreement of the parties the two writs of error have been submitted together because the cases present a common question of law.



CURRIE, J. The question presented by the writs of error is:

Upon termination of federal supervision and control over the Menominee Indian Tribe and the Menominee Indian Reservation, did the enrolled members of the Tribe and their lands become subject to the same Wisconsin game laws as other persons and lands within the state?

In order to resolve this question it is necessary to review the pertinent historical facts. These commence with the treaty of October 18, 1848, between the United States and the Menominee Tribe (9 U.S. Stat. at L. 952). By this treaty the Menominees ceded, sold and relinquished to the United States "all their lands in the State of Wisconsin wherever situated."<sup>1</sup> The treaty further provided that, in consideration for this cession, the United States give the Indians "for a home, to be held as Indians' lands are held" a large tract of land west of the Mississippi river, and that the Menominees "shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof and until the President shall notify them that the same are wanted." In 1850 an exploring party found that the lands west of the Mississippi were unsuited to the Menominees' circumstances. As a result they then petitioned the President for permission to stay longer on the ceded lands. Thereafter, Elias Murray, Superintendent of Indian Affairs, accompanied by three of the Menominee chiefs, explored lands on the Wolf and Oconto rivers in

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<sup>1</sup> The boundaries of the area ceded to the United States under this treaty, which form a wedge-shaped tract located in east-central Wisconsin, are shown on Map "Wisconsin 1," Royce, *Indian Land Cessions*, Part 2, H. R. Doc. No. 118, Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution (1896-1897). The figure 271, which is superimposed upon this area of the map, is explained at pages 780-781. The approximate boundaries of this area are also shown on a smaller map appearing in Raney, *Wisconsin—A Story of Progress*, at page 78.

Wisconsin, and Murray recommended as a home for the Menominees a tract 30 by 18 miles, comprising fifteen townships.<sup>2</sup>

By further treaty made on May 12, 1854 (10 U.S. Stat. at L. 1064), the United States ceded to the Menominees a tract 24 by 18 miles on the Wolf river, consisting of twelve townships, "to be held as Indian Lands are held."<sup>3</sup> This 1854 treaty stated that its articles were "supplementary and amendatory" to the 1848 treaty. By the 1854 treaty the Menominees ceded back to the United States all lands west of the Mississippi. In 1856 the Menominees sold to the Stockbridge Indians two of their twelve townships. The remaining ten townships thus constituted the Menominee Indian Reservation. This reservation continued in existence until the "Termination Act" (68 U.S. Stat. at L. 250, as amended, 70 U.S. Stat. at L. 549, 72 U.S. Stat. at L. 290, 74 U.S. Stat. at L. 867; 25 U.S.C. secs. 891-902), passed originally by congress in 1954, became effective by the Secretary of Interior's proclamation of April 29, 1961 (26 Fed. Reg., No. 82, April 29, 1961, at page 3726). This proclamation proclaimed the transfer (pursuant to sec. 899 of the Termination Act) of all tribal property held in trust by the United States government, and the termination of all federal supervision and control over the Menominee Indians and the Menominee Indian Reservation effective midnight April 30, 1961. Title to the lands comprising the former Menominee Indian Reservation is now held by Menominee Enterprise, Inc., a Wisconsin corporation incorporated on January 23, 1961. The capital stock of this corporation is held in a voting trust for the benefit of the members of

<sup>2</sup> These facts are set forth in Menominee Tribe of Indians (1942), 95 Ct. of Cl. 232.

<sup>3</sup> This tract, less the two townships later sold to the Stockbridge Tribe, is shown on the Map designated as "Wisconsin 2" of Royce, Indian Land Cessions, referred to in footnote 1, and is designated on the map by the numeral 322.

the Menominee Indian Tribe. The acts committed by defendants which led to the instant criminal prosecutions occurred on these lands.

In view of the foregoing history we are faced with the preliminary question of whether, at the time the Termination Act became effective, the Menominees had exclusive hunting rights free from the state's game laws which arose either by reservation under the 1848 treaty (as modified by the 1854 treaty), or by cession under the 1854 treaty.

This court in *State v. Johnson* (1933), 212 Wis. 301, 249 N. W. 285, citing *United States v. Winans* (1905), 198 U.S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, held that where Indians cede part of their lands by treaty and retain other lands, for their own use, as to which no government patents have ever been issued, their rights to fish and hunt on their retained lands, without being subject to the state's fish and game laws, continue even though the treaty contains no express reservation to that effect. We do not consider, however, that this principle has any application to the instant cases for two reasons. First, on the record before us, we cannot determine whether the lands where the alleged offenses were committed were part of the lands then owned by the Menominees at the time of the 1848 treaty. Only part of the former Menominee Indian reservation was included in the tract ceded to the United States by that treaty. The other part of the reservation consisted of lands which the Chippewa Indians had ceded to the United States by treaty made October 4, 1842.<sup>4</sup> Secondly, the 1848 treaty ceded all Menominee lands in Wisconsin to the United States, and the 1854

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<sup>4</sup> This is apparent by comparing Maps "Wisconsin 1" and "Wisconsin 2" of Royce referred to in footnotes 1 and 3, and by referring to pages 776-777 of the text. The lands ceded by the Chippewas in 1842 is represented on Map "Wisconsin 1" by the tract bearing the numeral 261.

treaty did not abrogate this cession, but made an entirely new cession of the twelve townships to the Menominees. This is so even though the 1854 treaty stated that it was "supplementary and amendatory" to the 1848 treaty.

Therefore, if the Menominees, prior to the effective date of the Termination Act, had exclusive hunting rights over the lands embraced in their reservation free from the state's game laws, such rights must be grounded on the 1854 treaty provision whereby such lands were ceded to them "*to be held as Indian Lands are held.*" On the face of it this is an ambiguous provision. One permissible interpretation would be that the Menominees would enjoy the same rights with respect to the ceded lands as Indians are entitled to with respect to lands owned and occupied by them which have never been ceded by treaty. Among such rights would be that of hunting free from the restrictions of any state game laws. The rule of construction to be followed in interpreting Indian treaties is that in case of ambiguity they are to be interpreted in favor of the Indians. This was the holding in *Winters v. United States* (1908), 207 U.S. 564, 576-577, 28 Sup. Ct. 207, 52 L. Ed. 340, wherein the court declared:

"By a rule in interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them "to be held as Indian

Lands are held." Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty.

This brings us to the crucial question of whether these exclusive rights to hunt free of the state's game laws were ended by the taking effect of the Termination Act. Congress has plenary power to deal with the Indians and may abrogate by statute Indian privileges and rights, including treaty rights. This principle was clearly enunciated in *Lone Wolf v. Hitchcock* (1903), 187 U.S. 553, 565-566, 23 Sup. Ct. 216, 47 L. Ed. 299, wherein the court stated:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U.S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas v. Gay*, 169 U.S. 264, 270; *Ward v. Race Horse*, 163 U.S. 504; 511; *Spalding v. Chandler*, 160 U.S. 394, 405; *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U.S. 114, 117; *The Cherokee Tobacco*, 11 Wall. 616."

For a recent federal case which acknowledges the existence of this plenary power of Congress over Indian tribes which cannot be limited by treaties, see *Anderson v. Gladden* (9th Cir. 1961), 293 Fed. (2d) 463, affirmed



by memorandum decision, 368 U.S. 949, 82 Sup. Ct. 390, 7 L. Ed. (2d) 344 (1961).

Sec. 891 of the Termination Act provides that the purpose "is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." Sec. 899 of the Act provides that upon the Secretary of the Interior publishing a proclamation in the Federal Register that all tribal property has been transferred in accordance with the Act, "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

The italicized statutory language, given its plain and ordinary meaning, would subject the Menominees' pre-existing exclusive hunting rights to the state's game laws. However, defendants' counsel contends that the legislative history surrounding the enactment of the Termination Act precludes such an interpretation because it shows that this was not the intent of Congress.

The original bill, which was finally enacted by the 83rd Congress in 1954 as the Termination Act, originated in the House of Representatives as H. R. 2828. Two other companion bills to provide for the withdrawal of the Menominee Tribe from federal jurisdiction were also introduced, the one in the Senate being S. 2813, and the one in the House of Representatives being H. R. 7135. Joint hearings on all three bills were held before Subcommittee of the Committee on Interior and Insular Affairs of the Senate and the Subcommittee of the Committee on Interior and Insular Affairs of the House of Representatives on March 10th, 11th, and 12th, 1954. Both S. 2813 and H. R. 7135 contained express provisions which preserved any special hunting and fishing rights the Menominees

might have by treaty, statute, custom or judicial decision. H. R. 2828 contained no such corresponding provision. At pages 587-589, the printed report of the proceedings of this joint hearing<sup>5</sup> contains a letter dated March 5, 1954, addressed to the chairman of the House Committee on Interior and Insular Affairs by Orme Lewis, Assistant Secretary of the Interior, which explains the differences between the three bills, and mentions the difference in the treatment of hunting and fishing rights noted above. With respect to H. R. 2828 the letter states (p. 588):

"H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have. If any special hunting and fishing rights have been granted by statute, however, they will be repealed by the provision of the bill making inapplicable all statutes that apply to Indians merely because of their status as Indians."

H. Rex Sigler of the Solicitor's Office, Department of Interior, gave this testimony at the joint hearing (at page 629):

"The next difference relate to hunting and fishing rights. The earlier bill [H. R. 2828] does not say anything at all about the subject. It is silent. And by its silence it, in my judgment, makes no change in any treaty rights that may exist. However, the earlier bill will repeal any hunting and fishing rights that may have been granted by statute. I do not know of any such rights, but there is the general provision in the bill making inapplicable to these Indians Federal legislation that applies to Indians as such, which would affect any special statute that may be on the books. Again, I do not know of any such statute. It would not, however, in my judgment, af-

<sup>5</sup> "Joint Hearings Before the Subcommittee of the Committees on Interior and Insular Affairs, Congress of the United States, Eighty-Third Congress, Second Session on S. 2813, H. R. 2828 and H. R. 7135."

fect the treaty rights, which are not specifically mentioned but are not in conflict with this particular bill.

"The later bill, however, would specifically preserve all hunting and fishing rights granted not only by treaty but also by statute or custom or judicial decision. And to that extent, the bill would qualify the authority of the State to apply its conservation laws. So the issue, as I see it, is whether the Federal Government should specifically provide that hunting and fishing rights beyond treaty rights should be immune from State regulation."

Both the Lewis letter and the Sigler statement are favorable to the defendants' position. This is because both take the position that H.R. 2828 would not affect fishing and hunting rights conferred by treaty while it would effect those conferred by statute. Neither, however, specifically mentions the provision of the bill now found in sec. 899 of the Termination Act that "*the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

At the joint hearing Glen A. Wilkinson, attorney for the Menominee Tribe, submitted a written statement which is printed in full in the report of this hearing. In this written statement Wilkinson commented on that part of the Lewis letter, or report, of March 5, 1954, quoted above (at page 697):

"... the statement is made that 'H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have.' Whether it 'purports' to affect such treaty rights seems immaterial; the fact is that it does, at least by implication, abolish the tribal rights to exclusive hunting and fishing privileges within the reservation—rights which were solemnly assured to the tribe in perpetuity."

Thus two conflicting interpretations of the effect of H. R. 2828 on the Menominees' fishing and hunting rights were presented at the joint hearing. Counsel for the defendants contends that the tribal representatives agreed to the interpretation of Lewis and Sigler. Wilkinson's statement seems to refute this. We are unable to find any proof that Congress in enacting H. R. 2828, without any express reference to hunting and fishing rights, intended to agree with the interpretation of Lewis and Sigler. An equally tenable inference is that Congress, in enacting the Termination Act which ended the status of the Menominees as wards of the United States, intended that whatever exclusive hunting and fishing rights the Indians possessed on their tribal lands should be subject to the same state conservation laws as are the hunting and fishing rights of any other landowners.

In considering the instant problem of interpretation we consider pertinent the preamble of House Concurrent Resolution 108, 83rd Congress, 1st Session, pursuant to which resolution H. R. 2828 was drafted and introduced:

"Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

"Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens:"<sup>6</sup>

It is our conclusion that the express provision of sec. 899 of the Termination Act that "the laws of the several States shall apply to the tribe and its members in the

<sup>6</sup> This resolution is set forth in full at page III of the report of the joint hearing referred to in footnote 5.

same manner as they apply to other citizens or persons within their jurisdiction," includes the state conservation laws applicable to hunting. To this extent the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation. Whether the Menominees by reason of treaty still enjoy any special hunting rights over their former reservation lands, other than that of being free of such game laws, which were not abrogated by the Termination Act, we do not here decide.

*By the Court.*—Judgments reversed and causes remanded for further proceedings not inconsistent with this opinion.

\* \* \* \*

DIETRICH, J. (dissenting). I cannot agree with the majority decision that the Termination Act abrogates the rights of the Menominee Indians to exercise their hunting and fishing rights free from the state's game laws. The majority concedes that under the 1848 and 1854 treaties the hunting and fishing rights of the Menominee Indians were held free from state game law restrictions. The Termination Act of 1961, contains no reference to the subject, and does not purport to affect any treaty rights the Indians may have. The Termination Act is based on the assumption that during the years of government supervision of Indian affairs, the government has so advanced and prepared the Indians for modern living, that they have become self-sufficient. The amount of fiscal aid provided the Menominees in the short period since the enactment of the Termination Act is by itself sufficient to show the unsoundness of this assertion. While hunting and fishing is not in itself a sufficient supplement to the modern way of life, it does help. The rights of the Menominee Indian to hunt and fish on tribal lands far outweighs any need of the state of Wisconsin or any of its



agencies to invade these rights. This is especially so in that these rights were reserved to the Menominees under the treaties of 1848 and 1854.

An examination of the record discloses that the deed of forest lands from the United States to Menominee Enterprises, Inc., dated April 26, 1961, contains a provision prohibiting transfer of ownership of the lands for a period of thirty years without prior consent of the state conservation commission and approval of the Governor. The conveyances from Menominee Enterprises to the individual Menominee Indian landholders give Menominee Enterprises an option to repurchase the lands in the event that the grantees decide to sell. In other words, Menominee Enterprises exercises complete control over the lands. It should also be noted that the Termination Act provides a way of life for the Indians by a provision that the timberland be operated on a sustained yield basis. Their other way of life, namely by hunting and fishing, is not referred to at all. The conveyances give Menominee Enterprises complete control over transfer of the lands, and the sustained yield provisions of the Termination Act control the use of the lands. How, then, can this court say that the Indians have been given the same rights as other citizens of Wisconsin, when control over any transfer of their lands is to be held in trust for a period of thirty years, and when the use to which the Menominees may put these lands is closely regulated by the provisions of the Termination Act, and the Menominee Indians Assistant Trust. In effect, the Menominee Indians have not received full status as citizens, and under the facts of the instant case, retain their inherent tribal hunting and fishing rights, which were assured to them in perpetuity under the terms of the treaties of 1848 and 1854. I would affirm the judgment of the trial court.



No. ~~1418~~

FILED

MAY 22 1967

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF CLAIMS

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JAMES R. MODRALL, III  
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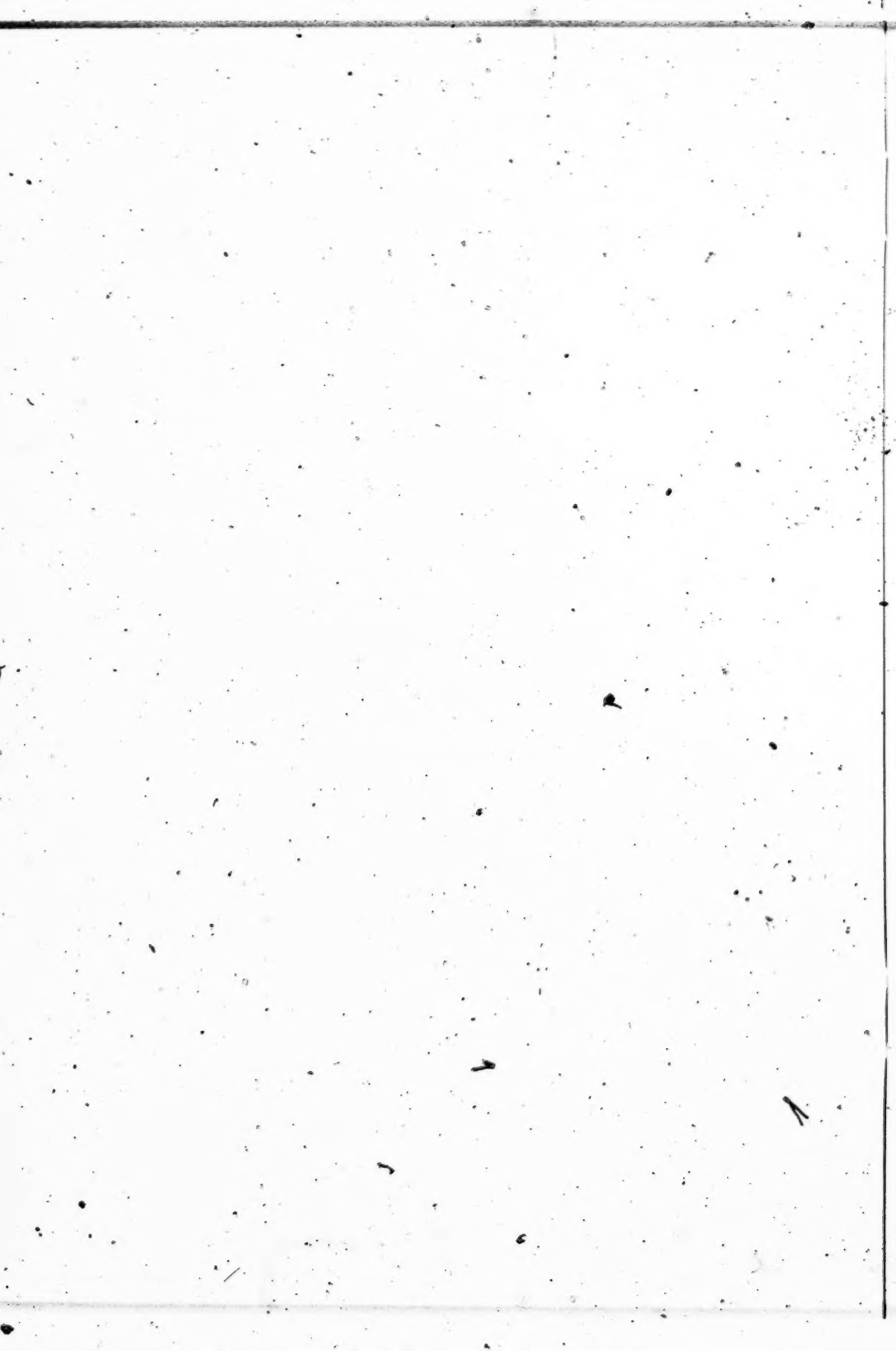
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1966

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No.

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MENOMINEE TRIBE OF INDIANS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF CLAIMS**

---

Petitioner, the Menominee Tribe of Indians of the State of Wisconsin, prays that a writ of certiorari issue to review the final judgment of the United State Court of Claims, holding that the Tribe is not entitled to recover just compensation for the loss of treaty hunting and fishing rights.

**OPINION BELOW**

The opinion of the Court of Claims appears post, Appendix A. It has not yet been reported in either the Federal or the Court of Claims Reporter.

## JURISDICTION

The judgment of the Court of Claims was entered April 14, 1967, see post, Appendix A. This Court has jurisdiction under 28 U.S.C. § 1255(1).

## QUESTION PRESENTED

In 1963, the Supreme Court of Wisconsin held that the Menominee Termination Act of 1954 abrogated the treaty right of the Menominee Indians to hunt on their own reservation free of state regulation. The Indians thereafter filed a claim in the Court of Claims for compensation for the loss of the hunting and fishing rights. Now, the Court of Claims has held that the Termination Act did *not* abrogate the rights.

If the Wisconsin Supreme Court is right, the Menominees are entitled to just compensation. If the Court of Claims is right, the Menominees are entitled to hunt and fish on their own land without risk of being jailed by the Wisconsin game warden.

The question is whether the Menominee Termination Act did or did not abrogate the treaty hunting and fishing rights of the Menominee Indians.

## TREATIES AND STATUTES INVOLVED

Treaty of May 12, 1854, 10 Stat. 1064, between the Menominee Tribe of Indians and the United States, Appendix B, and Menominee Termination Act of 1954 as amended, 25 U.S.C. §§ 891-902, as made effective by Proclamation of the Secretary of Interior, April 29, 1961, 26 Fed.Reg. 3726, Appendix C.



## STATEMENT OF THE CASE

## Origin of the Hunting and Fishing Rights

Since time immemorial the Menominee Indians have lived as a tribe in eastern Wisconsin. By way of background, it may be noted that by the Treaty of St. Louis, 7 Stat. 153 (1817), the Menominee Indians acknowledged themselves to be under the protection of the United States, and the parties agreed there would be perpetual peace and friendship between them.<sup>1</sup> The Treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundaries of the Menominees' territory. By the Treaty of Washington, 7 Stat. 342 (1831), as amended, 7 Stat. 405 (1832), they ceded some 3,000,000 acres of their aboriginal territory, and expressed a desire to remain under the "parental care and protection" of the United States. By the Treaty of Cedar Point, 7 Stat. 506 (1836), they ceded approximately 4,184,000 more acres.

By the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952 (1848), the Menominees ceded the balance of their lands in Wisconsin (estimated to contain about 4,000,000 acres),<sup>2</sup> in exchange for at least 600,000 acres west of the Mississippi. To give them time to explore their new lands, the Indians were to be permitted to remain on their ceded lands for two years, and thereafter until the President should notify them that the same were wanted.<sup>3</sup>

An exploration party of Menominees inspected the new lands, but reported that the lands were not suitable

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<sup>1</sup> The facts in this and the following paragraphs are based on the citations given and on the Court of Claims' findings, Appendix A, post.

<sup>2</sup> Annual Report of the Commissioner of Indian Affairs, 1848, Ex.Doc. 1, 30th Cong., 2d Sess., p. 397-8.

<sup>3</sup> Article 8.

to the tribe's needs. The Menominees refused to move to the new lands. They claimed that the understanding in 1848 had been that if the new lands were not acceptable they would be offered acceptable lands elsewhere.<sup>4</sup>

The Government extended the deadline for leaving, and suggested that they remove instead to a certain tract on Wolf River in Wisconsin, a little north of their then camping grounds. The proposed tract contained twelve townships, or 276,480 acres. The Menominees agreed and removed thither in the fall of 1852.<sup>5</sup>

The Government sought the permission of the state to the setting aside of the Wolf River reservation for the Menominees, and on February 1, 1853, by joint resolution, the two houses of the Wisconsin legislature consented.<sup>6</sup>

We come now to the treaty involved in this case. In order to confirm the events of 1848-1853, the tribe and the United States entered into the Treaty of Wolf River, 10 Stat. 1064 (1854), whereby the Menominees retroceded the undesirable lands they had acquired under the 1848 treaty, and the United States confirmed to them the substitute Wolf River Reservation, "for a home, to be held as Indian lands are held . . . ." Nothing was expressly

<sup>4</sup> Annual Report of the Commissioner of Indian Affairs, 1851, H.R. Ex. Doc. 2, Part III, 32d Cong., 1st Sess., pp. 266-67, 293. See also recitations in the Treaty of Wolf River, 10 Stat. 1064 (1854), post, Appendix B.

<sup>5</sup> Annual Report of the Commissioner of Indian Affairs, 1852, Sen. Doc. 1, 32d Cong., 2d Sess., pp. 295, 325. Congress appropriated \$25,000 in 1852 to enable the Indians to move to the Wolf River Reservation. 10 Stat. 47.

<sup>6</sup> 1853 Wis.Jt.Res., Chap. I, which states: "Resolved by the Senate and Assembly of the State of Wisconsin, That the assent of the State of Wisconsin is hereby given to the Menominee nation of Indians to remain on the tract of land set apart for them by the President of the United States on the Wolf and Oconto rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows. . . ."

said of hunting rights, but as the Court of Claims found on the evidence in another case,<sup>7</sup>

"The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game.

"... part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty, was the fact that the tract in question contained swamp lands which were suitable for hunting."

In 1858 the Menominees ceded two of their twelve townships to the United States, for use of certain New York Indians, 11 Stat. 679. The remainder, comprising about 230,000 acres, has remained their reservation to the present day. It has never been allotted, and with minor exceptions (such as public roads), remains today as in 1854 an intact tract of land, wholly owned by the tribe.<sup>8</sup>

#### The Termination Act of 1954

In 1954, Congress enacted the Menominee Termination Act.<sup>9</sup> The purpose of the Act was "to provide for the orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."<sup>10</sup>

<sup>7</sup> *Menominee Tribe v. United States*, 95 Ct.Cl. 232, 240, 241 (1942).

<sup>8</sup> The technical form of ownership since 1961 has been that the land is owned by the tribal corporation, and the Indians are the sole shareholders.

<sup>9</sup> 25 U.S.C. §§ 891-902, Appendix C, post.

<sup>10</sup> 25 U.S.C. § 891.

A comprehensive program was authorized to implement the Act and to insure that the transition was not detrimental to the tribe. The tribe was to propose a plan for administration of tribal property and affairs. It was contemplated that the tribe would incorporate, the members would be stockholders, and the stockholders' powers would be exercised by a group of voting trustees. The Secretary of Interior was authorized to transfer to the tribal corporation, on or before April 30, 1961, all tribal property held in trust by the United States.<sup>11</sup>

The Act provided that upon transfer of the property to the tribe, the Secretary was to publish a proclamation of that fact and—<sup>12</sup>

“... the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.”

The Act was silent about preservation of hunting and fishing rights, although it did require that the tribe's plan contain provisions for the protection of its fish and wildlife.<sup>13</sup>

The legislative history was of little help in determining whether Congress intended to destroy the tribe's hunting and fishing rights, or whether Congress even specifically considered the problem, although the problem was called to its attention.<sup>14</sup>

Pursuant to the Act, the Secretary's proclamation of termination was published on April 29, 1961, and the res-

<sup>11</sup> 25 U.S.C. §§ 896, 897.

<sup>12</sup> 25 U.S.C. § 899.

<sup>13</sup> 25 U.S.C. § 896.

<sup>14</sup> See Joint Hearings on H.R. 2828 Before Subcommittees of the Senate and House Interior Committees, 83d-Cong. (Mar. 10, 11, 12, 1954), pp. 697 ff.

ervation was conveyed intact to the new tribal corporation.<sup>15</sup>

### History of Litigation

This suit has a rather long history of litigation. In 1962, the year following the Secretary's proclamation, the State took the position that the Menominees were fully subject to State hunting and fishing regulations.<sup>16</sup> It prosecuted three Menominee Indians for unlawfully hunting deer on the reservation with the aid of an artificial light and for unlawfully transporting a loaded and uncased gun in an automobile. The Indians argued that the 1854 treaty guaranteed the right to hunt on their reservation free of the white man's hunting rules, and that the Termination Act, being silent on the matter, did not abrogate these rights. The trial court agreed, and dismissed the prosecution.<sup>17</sup>

<sup>15</sup> The proclamation appears at 26 Fed. Reg. 3726.

<sup>16</sup> A small sample of state hunting restrictions includes the following:

Hunting licenses are required, with fees ranging from \$2 to \$10. 4 West's Wisc. Stat. Ann. §§ 29.10, 29.105, 29.13, 29.132, 29.371. A "sportsman's" license can be bought for \$6.50. Id. § 29.147.

Certain game can never be taken: for example quail, prairie chicken, turkey, mourning doves, plovers, badger, woodchuck, moose, elk, flying squirrel, white deer. Wisc. Admin. Code § WCD 10.01(2)(e), 10.03.

Permitted game may be taken only during certain seasons, and subject to daily bag limits. For example, partridges, up to three per day, may be taken between Oct. 19 and Nov. 24 only. Id. § WCD 10.01(2)(d). Squirrels, up to five per day, may be taken between Sept. 28 and Jan. 31. Id. § WCD 10.01(3)(a). Deer, one a day only, may be taken between Oct. 15 and Dec. 1. Id. § WCD 10.01(3)(e).

Prohibited methods include, for example, night hunting, § WCD 10.06; use of nets or snares, § WCD 10.07(2); shooting birds with rifles, § WCD 10.07(5); hunting deer or bear in water, § WCD 10.10(2); use of bows of less than 30 lbs. pull, § WCD 10.11; hunting from a motorboat, § WCD 10.12(1)(a); tending traps at night, § WCD 10.13(3).

<sup>17</sup> Appendix D post.



The State appealed to the Wisconsin Supreme Court, which reversed, in a two-to-one decision.<sup>18</sup> All three judges agreed with the trial court that the tribe had hunting rights under the 1854 treaty, but the majority held that the Termination Act abrogated these rights.<sup>19</sup>

"It is our conclusion that the express provision of Sec. 899 of the Termination Act that 'the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction,' includes the state conservation laws applicable to hunting. To this extent the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation."

This Court refused to review the foregoing decision.<sup>20</sup>

On September 30, 1965, the tribe filed a claim in the Court of Claims for just compensation for the loss of its hunting and fishing rights. On April 14, 1967, the Court by a vote of four-to-three dismissed the petition.<sup>21</sup> The majority, like the two Wisconsin courts, held that the tribe had hunting and fishing rights under the Treaty of 1854, but contrary to the majority of the Wisconsin Supreme Court, held that these rights were *not* abrogated by the Termination Act of 1954. Accordingly, said the Court, the tribe still owns the rights, and is not entitled to compensation.

The dissenters felt that the Indians should not be left in such a dilemma, and suggested as possible solutions (1) that this Court grant *certiorari*, or (2) that the

<sup>18</sup> Appendix E post.

<sup>19</sup> Appendix E, pp. 67-68 post.

<sup>20</sup> *Cert. den.*, 377 U.S. 991, *reh. den.* 379 U.S. 871; No. 930 O.T. 1963.

<sup>21</sup> Appendix A post.

Court of Claims accept the Wisconsin court's ruling in a spirit of comity (with final resolution left to "a higher court"; i.e. this Court), or (3) that the question be certified to this Court under 28 U.S.C. § 1255(2). As to the merits, the dissenters favored the tribe:

"The Menominees are either entitled to their hunting and fishing rights under the Treaty or they are entitled to damages because these rights have been taken away . . . ."

From the decision of the Court the tribe seeks certiorari.

#### **Reasons for Granting the Writ**

This case presents the question whether the Menominee Termination Act of 1954 abrogated the Menominee Indians' right, guaranteed by the 1854 treaty, to hunt and fish on their own land free of the white man's regulations. The Wisconsin Supreme Court said yes, and the Court of Claims said no. In other words, the decisions of the two courts are in direct conflict with each other on an interpretation of the same act of Congress involving the same tribe of Indians and the same federal treaty. If the tribe's members exercise their rights as declared by the Court of Claims, they will be thrown in jail by the Wisconsin authorities.

The conflict involves the vitally important hunting and fishing rights of the Menominee Tribe, which has over 3,200 enrolled members. A substantial proportion of the members still engage in hunting and fishing to supplement their diet, as indeed they have since time immemorial.<sup>22</sup>

<sup>22</sup> This fact was alluded to by the trial judge in *State v. Sanapaw*, Appendix D, p. 55 post, when he stated:

"Almost any day in this court the silent tragedy continues. Young Indians, both male and female, and even the older ones with no employment supplement the modern way of life by

The question is important not only to the Menominees, but to the many other Indian tribes as to whom federal supervision has been terminated.<sup>23</sup> And as termination of Indian tribes has been a formal policy of Congress,<sup>24</sup> it is to be expected that federal supervision of other tribes will be terminated in the future, and that the question raised herein will be important to those tribes.

The same question as herein raised has been litigated in regard to the Klamath Indians of Oregon, who like the Menominees were removed from federal supervision in 1961.<sup>25</sup> Their treaty, approved in 1864,<sup>26</sup> like the Menominee treaty, was silent as to hunting rights. After federal supervision was withdrawn, the Oregon authorities threatened to jail Indians hunting contrary to state game regulations. In 1961 a local state court held that the Klamath Termination Act did not abrogate the Klamaths' treaty right to hunt on tribal lands free of outside regulation.<sup>27</sup> In 1963 the U.S. District Court held the same

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theft and pawning. Fiscal aid by the government since termination is self-evident that the termination was premature. Hunting and fishing is not in itself a sufficient supplement to the modern way of life, but it does help."

<sup>23</sup> See the following Termination Acts:

Klamath Indians, 25 U.S.C. § 564 (enacted 1954); Mixed-Blood Ute Indians, 25 U.S.C. § 677 (enacted 1954); Western Oregon Indians, 25 U.S.C. § 691 (enacted 1954); Alabama & Coushatta Indians, 25 U.S.C. § 721 (enacted 1954); Paiute Indians, 25 U.S.C. § 741 (enacted 1954); Wyandotte Indians, 25 U.S.C. § 791 (enacted 1956); Peoria Indians, 25 U.S.C. § 821 (enacted 1958); Ottawa Indians, 25 U.S.C. § 841 (enacted 1956); Ponca Indians, 25 U.S.C. § 971 (enacted 1962).

<sup>24</sup> H.Con.Res. 108, 83d Cong., 97 Stat. B-132 (1953).

<sup>25</sup> 25 U.S.C. §§ 564 ff.

<sup>26</sup> 16 Stat. 707.

<sup>27</sup> *State v. Pearson*, Klamath Cy. Dist. Ct., (unreported, Appendix F post).

way.<sup>28</sup> The Court of Claims below agreed with these decisions.

This case is similar to those involving a private patent, whose validity has been determined by two conflicting appellate decisions.<sup>29</sup> Presumably the considerations which lead this Court to resolve conflicts in regard to privately owned patents would apply at least as much to conflicts in regard to rights owned by a tribe under a federal treaty.

It should be noted that the three dissenting judges in the Court of Claims below, after noting that the majority decision "leaves plaintiff in a state of legal weightlessness," offered as two possible solutions that this Court grant certiorari or that the question be certified to this Court. The latter is now barred; only a grant of certiorari will permit the tribe's dilemma to be resolved.

<sup>28</sup> *Klamath & Modoc Tribes v. Maison*, Civil No. 8081, U.S. Dist. Ct. D. Ore., December 10, 1963 (unreported, Appendix G post); cf. related cases, 139 F.Supp. 634 (1956) and 338 F.2d 620 (9th Cir. 1964).

<sup>29</sup> See *Universal Oil Co. v. Globe Oil Co.*, 322 U.S. 471 (1944); *Dow Co. v. Halliburton Co.*, 324 U.S. 320 (1945).

**CONCLUSION**

The petition should be granted.

Respectfully submitted,

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## APPENDIX A

## IN THE UNITED STATES COURT OF CLAIMS

No. 339-65

(Decided April 14, 1967)

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THE MENOMINEE TRIBE OF INDIANS, SUING ON ITS OWN BEHALF AND AS THE REPRESENTATIVE OF ITS MEMBERS, OR THEIR SUCCESSORS, AS A CLASS; AND MENOMINEE ENTERPRISES, INC., SUING ON ITS OWN BEHALF AND AS THE REPRESENTATIVE OF ITS STOCKHOLDERS, OR THEIR SUCCESSORS, AS A CLASS; AND GORDON DICKIE, JAMES FRECHETTE, JERRY GRIGNON, AND GEORGE KENOTE, EACH SUING ON HIS OWN BEHALF AND AS THE REPRESENTATIVE OF THE MEMBERS OF THE MENOMINEE TRIBE OF INDIANS, OR THEIR SUCCESSORS, AS A CLASS, AND AS THE REPRESENTATIVE OF THE STOCKHOLDERS OF MENOMINEE ENTERPRISES, INC., OR THEIR SUCCESSORS, AS A CLASS; AND FIRST WISCONSIN TRUST COMPANY, SUING AS TRUSTEE ON BEHALF OF ALL THE BENEFICIARIES, OR THEIR SUCCESSORS, OF THE MENOMINEE ASSISTANCE TRUST ESTABLISHED PURSUANT TO THE MENOMINEE TERMINATION ACT OF 1954, 25 U.S.C. § 891-902 v. THE UNITED STATES

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*Charles A. Hobbs*, attorney of record for plaintiffs. *Wilkinson, Cragun & Barker* and *Angelo A. Iadarola*, of counsel.

*Ralph A. Barney*, with, whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

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## ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

The Menominee Tribe of Indians, suing on its own behalf and as the representative of its members, or their successors, as a class; and Menominee Enterprises, Inc., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and Gordon Dickie, James Frechette, Jerry Grignon, and George Kenote, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians, or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and First Wisconsin Trust Company, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902 (1964), have filed this suit to collect damages from the Government for the alleged loss of hunting and fishing rights on their reservation in Wisconsin which they claim were abrogated and cancelled by the Menominee Termination Act of 1954, *supra*, passed by the Congress of the United States. They assert that this Act enabled the State of Wisconsin to impose its hunting, fishing, and conservation laws upon the members of the tribe living on the reservation and this has extinguished their right to hunt and fish on their land "untrammelled by any state law or regulation"; that this is a valuable property right and the Government should compensate them for its loss. They admit they have the right to hunt and fish on the reservation on the same basis as exists for any non-Indian landowner on his land, but they claim the right to be free of any state hunting and fishing laws. They say they should recover damages for the loss of this freedom.

The Government has challenged the jurisdiction of this court and contends that the Menominee Termination Act,

*supra*, abolished the Menominee Tribe of Indians and that the plaintiffs are not entitled to maintain this suit in this court. We do not agree. It is clear from the wording of the various sections of the Termination Act itself that it was contemplated the Menominee tribe would continue in existence after the Act became effective. For instance, the Act provided procedure for setting up a final roll of the members of the *tribe* and after the roll was completed, certificates were to be issued by the *tribe* to the members whose names appeared on the roll. Furthermore, the interest was to be alienable only in accordance with such regulations as may be adopted by the *tribe*. It provides further, that the Secretary of the Interior would transfer all tribal property to a trustee "for the benefit of the Menominee tribe." Finally, the Act states that after it becomes effective, the individual members of the *tribe* shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and all statutes of the United States applicable to Indians because of their status as Indians shall no longer be applicable to the members of the *tribe* and the laws of the several states shall apply to the *tribe* and its members and that nothing in the Act shall affect the status of the members of the *tribe* as citizens of the United States. The Termination Act did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the *tribe*. The Menominee Indians continue to constitute a tribe whose membership is composed of those persons whose names appear on the official roll of the tribe prepared in accordance with the terms of the Termination Act. The tribe continues to hold the beneficial and equitable interest in the property that was conveyed by the Secretary of Interior to plaintiffs, Menominee Enterprises, Inc., and First Wisconsin Trust Company, Trustees, in trust for the tribe. Certainly the Menominees constitute a "tribe, band, or other identifiable group of American

Indians" within the meaning of the Indian Claims Commission Act of 1946, as amended, 28 U.S.C. § 1505 (1964), and they are asserting a claim in this case arising under the Treaty of 1854, *infra*, and the Termination Act, *supra*. Consequently, this court has jurisdiction of this case under the Indian Claims Commission Act, *supra*, and under the Tucker Act, 28 U.S.C. § 1491 (1964).

# I

The Menominee Indians have lived as a tribe since time immemorial in Wisconsin. They have made various treaties with the United States through the years, most of which have nothing to do with the present lawsuit. However, by way of background, we will point out that by the Treaty of St. Louis, 7 Stat. 153 (1817), they acknowledged themselves to be under the protection of the United States. The Treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundary questions, while by the Treaty of Washington, 7 Stat. 342 (1831), and 7 Stat. 405 (1832), they ceded 3 million acres to our Government. They ceded about 4,184,000 acres to the United States by the Treaty of Cedar Point, 7 Stat. 506 (1836), and in 1848, ceded the balance of their land of approximately 4 million acres by the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952, in exchange for about 600,000 acres west of the Mississippi River.

As a part of this last treaty and exchange, it was agreed that they could inspect the land west of the Mississippi before moving on it. They did so and reported dissatisfaction with it and refused to move to it. The Government then ceded them 276,480 acres of different land on Wolf River in Wisconsin which was acceptable to them and to which they moved in 1852.

In order to legalize this exchange of land, the Treaty of 1848 was amended by the Treaty of Wolf River, 10

Stat. 1064, 1065 (1854), by which the Menominees ceded back to the Government the lands west of the Mississippi which they had refused to accept and in return the Government gave to them the reservation on Wolf River "for a home, to be held as Indian lands are held, \* \* \*." No mention was made in this treaty or in the Treaty of 1848 about hunting or fishing rights.

Except for two small tracts ceded by the Menominees in 1856, for use by the New York Indians, 11 Stat. 679, the Wolf River Reservation of about 230,000 acres has remained intact as the Menominee Reservation to the present time. It was occupied and governed by them according to the customs, laws, rules and regulations of the tribe without any outside interference by the state or anyone else during the 100 years from 1854 to 1954. This freedom from outside regulation and interference during this period extended to and included their hunting and fishing on the reservation, which was controlled only by the rules and regulations of the tribe itself.

## II

We will consider first whether or not the Menominees had exclusive and unregulated hunting and fishing rights on their Wolf River Reservation. While it may be that the Menominees could establish a claim to such hunting and fishing rights by Indian title acquired by their ancestors through use and occupancy of land in Wisconsin for a long time, which may have included the land in their present reservation, these facts are not before us and we cannot speculate with reference to them. Actually, it is not necessary for us to pass upon any aboriginal claim to hunting and fishing rights, because the Menominees do not contend that their rights in this case are based on aboriginal title at all. Rather, they pitch their claim squarely on the hunting and fishing rights which they assert were given to them by the Government in the Treaty of Wolf River in 1854, *supra*.



That treaty, which created their present reservation, did not specifically or expressly mention hunting and fishing rights. Article 2 of the treaty (10 Stat. 1065) provided:

In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, [the land in question] \* \* \*.

The Menominees say that the language "to be held as Indian lands are held" grants them an unqualified right to hunt and fish on the reservation in their own way free from all outside regulation or control. We think they are right. Cf. *Oneida Tribe v. United States*, 165 Ct. Cl. 487, 490-91 (1964), *cert. denied*, 379 U.S. 946. *Moore v. United States*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827. The primary reason they accepted this reservation as their new home was that it was filled with all kinds of game. We so held in the case of *Menominee Tribe of Indians v. United States*, 95 Ct. Cl. 232, 240-41 (1941), where we said:

The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game. \* \* \*

\* \* \* part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty was the fact that the tract in question contained swamp lands which were suitable for hunting.

It should be remembered that at the time of the treaty in 1854; hunting and fishing was a way of life with the Menominees. They depended on it for their livelihood if not their very existence. It is inconceivable that a reservation would have been created for them at that time

without giving them the exclusive right to hunt and fish. The Supreme Court in discussing fishing rights of Indians in the case of *United States v. Winans*, 198 U.S. 371, 381 (1905), stated that such rights are "not much less necessary to the existence of the Indians than the atmosphere they breathed." The same observation applies to their hunting rights. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

The Supreme Court of Wisconsin in passing on the identical question before us in *Wisconsin v. Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41, 44 (1963), *cert. denied*, 377 U.S. 991 (1964), *rehearing denied*, 379 U.S. 871, said that if the 1854 treaty provision which ceded these lands to the Menominees "to be held as Indians lands are held" was ambiguous as to whether or not it included hunting and fishing rights, it should be interpreted in favor of the Indians, citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908). The court went on to say in the *Sanapaw* case:

\* \* \* Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty. *Ibid.*

We agree with the Supreme Court of Wisconsin that the 1854 treaty did grant exclusive hunting and fishing rights to the Menominees on their reservation free from the state's game laws. Furthermore, they enjoyed these exclusive rights for 100 years with the consent and acquiescence of the State of Wisconsin. We are supported in our decision by the cases of *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956), *Klamath & Modoc Tribes v. Maison*, (unreported, United States District Court for the District of Oregon, No. 8081 (1963)),

and *Oregon v. Pearson* (unreported, District Court of Klamath County, Oregon, No. 61-792c (1961)). In those cases the treaty between the Government and the Klamath and Modoc Tribes and the Yahooskin Band of Snakes in 1864, did not mention hunting or trapping rights on their reservation, but the courts held that the treaty granted them such rights by implication and that the Indians could hunt and trap on their reservation without restriction or control by the State of Oregon.

### III

We come now to the consideration of whether or not the Menominee Termination Act of 1954, *supra*, abrogated or cancelled the hunting and fishing rights of the Menominees on their reservation and thereby subjected them to the game laws of the State of Wisconsin on the same basis as if they were non-Indian citizens of the state. The Act did not mention hunting and fishing rights, but the Menominees point out that the Supreme Court of Wisconsin held in the case of *Wisconsin v. Sanapaw*, *supra*, that the following language in the Act cut off their unregulated hunting and fishing rights and made them subject to the game laws of Wisconsin:

SEC. 10. \* \* \* all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.* [Emphasis supplied.] 68 Stat. 252, 25 U.S.C. § 899 (1964).

Since there was no mention of hunting and fishing rights in the Act either by way of preservation or abrogation, we must look to the legislative history of the Act and to all of the facts and circumstances existing at the time of its passage, as well as at the time it was implemented and became effective, to determine if it cut off these rights

by implication. *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 260 (1956).

The right to hunt and fish Indian fashion is a valuable property right. See *United States v. Winans, supra*; *The Tlingit and Haida Indians of Alaska v. United States*, 147 Ct. Cl. 315, 177 F. Supp. 452 (1959). It should not be taken away by implication unless there is some cogent or compelling reason for doing so. This is in accord with the settled rule that repeals by implication are not favored and will not be held to have taken place if there is a reasonable construction, by which both the treaty and the statute can coexist consistently with the intention of Congress. *Ward v. Race Horse*, 163 U.S. 504, 511 (1896); *United States v. Zacks*, 375 U.S. 59, 67 (1963). See *United States v. Moore*, 62 F. Supp. 660, 667 (W.D. Wash. 1945), *aff'd*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947).

Turning to the legislative history, we find that the bill which was finally passed as the Termination Act, originated in the House of Representatives of the 83d Congress as H.R. 2828. There were two other bills, S. 2813 and H.R. 7135, on the same subject pending before the Congress at the same time. Both S. 2813 and H.R. 7135 provided for the preservation of the hunting and fishing rights the Menominees might have by treaty, statute, custom or judicial decision. H.R. 2828 was silent on the subject. At the hearings on the bills, two witnesses expressed their opinion that H.R. 2828 would not affect hunting and fishing rights acquired by *treaty* but would repeal such rights granted by *statute*. A third witness stated that he thought the bill by its silence would by implication abolish the tribal rights to exclusive hunting and fishing within the reservation.<sup>1</sup> The Congress enacted

<sup>1</sup> *Joint Hearings Before the Subcommittees of the Committees on further and Insular Affairs on S. 2813, H.R. 2828, and H.R. 7135*, 83d Cong., 2d Sess., pt. 6, at 588, 629, 697 (1954).

H.R. 2828 into law without any provision as to hunting and fishing rights. It is argued that Congress thus made a choice and cut off the exclusive hunting and fishing rights by implication. We do not agree.

There was no need for the Congress to provide for the preservation of the hunting and fishing rights in the Termination Act for at least two reasons. In the first place, they were preserved and protected for the Menominees by another bill that was passed by the same 83d Congress and considered by the same committees of both houses. It was passed as an amendment to Public Law 280, 18 U.S.C. § 1162 (1964), on August 24, 1954, only about two months after the Termination Act was passed on June 17, 1954, but over six years before the Termination Act became effective on April 30, 1961. Public Law 280 dealt with the extension of criminal jurisdiction of the State of Wisconsin over the Menominee Reservation and expressly reserved and protected the hunting and fishing rights of the Menominees in the following language:

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
	* * * *
Wisconsin	All Indian country with the State.

(b) *Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or commu-*



nity that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or *shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.* [Emphasis supplied.]

\* \* \* \*

It is logical to assume that the Congress, acting through its committees that handled both bills, as well as by its own action as a whole, knew that hunting and fishing rights were being protected in Public Law 280 and there was no need to mention them in the Termination Act.<sup>2</sup>

Also, it should be pointed out that H.R. 7135 and S. 2813, which were the other two bills considered by Congress when H.R. 2828 (The Termination Act) was also considered, contained language practically identical to the language in Public Law 280 with reference to hunting and fishing rights. For instance, they both provided:

SEC. 15. Nothing contained in this Act shall deprive the tribe or its members of any rights, privileges, or immunity afforded by treaty, statute, custom, or judicial decision, to fish, hunt, trap, and harvest the products of nature or the control, licensing, or regulation thereof, except as may be agreed upon from time to time by the tribe and the State of

<sup>2</sup> It should be noted that the bill (H.R. 1063) which became Public Law 280 was introduced on January 6, 1953, and was passed on August 15, 1953. On February 9, 1953, approximately one month after the introduction of H.R. 1063, the bill (H.R. 2828) which was to ultimately become the Menominee Termination Act was introduced. It was passed on June 17, 1954. The Menominee Reservation was added to those lands subject to Public Law 280 pursuant to the amendment of August 24, 1954.

Wisconsin; \* \* \* *Joint Hearings Before the Subcommittees of the Committees on Interior and Insular Affairs on S. 2813, H.R. 2828, and H.R. 7135, 83d Cong., 2d Sess., pt. 6, at 581, 583 (1954).*

Obviously, there was no need to protect the hunting and fishing rights in both the Termination Act and in Public Law 280 with almost the same phraseology. So, H.R. 2828 (The Termination Act) was passed without mention of such rights. But they were preserved in the Menominee Amendment to Public Law 280, which became law in 1954, almost seven years before the Termination Act became effective in 1961.

In the second place, it was unnecessary to preserve the hunting and fishing rights in the Termination Act because by the terms of the Act it was provided that the tribe would submit a plan to the Secretary of the Interior which:

SEC. 7. \* \* \* shall contain provision for protection of the forest on a sustained yield basis, and for the protection of the water, soil, fish and wildlife. 70 Stat. 549, 25 U.S.C. § 896 (1964).

The Act provided further that upon the submission of such a plan by the tribe and its approval by the Secretary of the Interior, he would issue a proclamation containing the plan and his approval thereof. The Termination Act would become effective upon the issuance and publication of the proclamation.

In due time, the tribe did submit such a plan to the Secretary of the Interior. It included a provision on law and order (which would include hunting and fishing) in the following language:

It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menominee Reservation having been surrendered by the

- United States by Public Law 280, 83d Congress, as amended (18 U.S.C. 1162).<sup>3</sup>

By this language, the tribe referred to Public Law 280 and in effect made it a part of its plan by reference, thereby protecting and preserving its hunting and fishing rights in great detail. It is pertinent to observe at this point that the amendment to Public Law 280, which was to incorporate the Menominee Reservation within its provisions, was introduced at the request of the Menominee Indians. At the time Public Law 280 was enacted, the tribe had requested exemption because they felt their tribal law was sufficient. The tribe thereafter reconsidered its position and authorized its attorneys and its tribal delegates to seek the amendment referred to in April 1954, prior to passage of the Termination Act. The amendment was to "carry out the wishes of the tribe." S. REP. No. 2223, *United States Code Congressional and Administrative News*, 83d Cong., 2d Sess. 3171-72 (1954).

Certainly the Menominee Tribe did not feel that the Termination Act divested them of their unrestricted right to hunt and fish. Furthermore, in seeking the amendment which would extend the criminal jurisdiction of Wisconsin over the Menominee Reservation, excluding the regulation of hunting and fishing rights granted by treaty, it cannot be said that a sacrifice of these rights was at all contemplated. The plan was approved and the Proclamation was issued by the Secretary of the Interior, thereby making the Termination Act effective on the 30th day of April 1961. By this procedure, the provisions of Public Law 280 that preserved the hunting and fishing rights of the Menominees were included in and made a part of the Termination Act of 1954 by reference. This leads us to the inescapable conclusion that the Termination Act not only did not abrogate the exclusive hunting and fishing

<sup>3</sup> 26 Fed. Reg. 3726, 3728 (1961).

rights of the Menominees on their own reservation, but actually preserved and protected them. Further supporting this view is the observation that a plan calling for the protection of fish and wildlife would hardly be necessary if state laws were to govern in those areas. See S. REP. No. 2412, 84th Cong., 2d Sess. 2 (1956), in which it is indicated that the Menominees would have no trouble formulating such a plan.

#### IV

We are mindful that this conclusion is different from the result reached by the majority of the Supreme Court of Wisconsin on the same question in the case of *Wisconsin v. Sanapaw*, *supra*, but it is in accord with the result of the dissenting opinion. In that case three Menominee Indians were charged in criminal complaints in the same case with hunting deer with the aid of an artificial light and with the transportation of a loaded and uncased gun in an automobile on the Menominee Reservation in violation of the game laws of the State of Wisconsin. The defendants pleaded not guilty but admitted, and the court found, that the alleged violations were, in fact, committed. The trial court, however, in an unreported written opinion found the defendants not guilty because they were enrolled members of the Menominee Indian tribe and the state had no jurisdiction to enforce its hunting and fishing regulations against them on the Menominee Reservation. It based its decision on the fact that the Treaty of 1854 granted the Menominee Indians the right to hunt and fish on their reservation free from regulation of the state game laws and that this right had been enjoyed by the Indians for over 100 years and that the Termination Act, *supra*, did not terminate such exclusive hunting and fishing rights. The state appealed the case to the Supreme Court of Wisconsin where the majority of the court reversed the decision of the trial court and held that the Menominee Termination Act abrogated the tribe's right

to be free of the state's game laws in hunting and fishing on its reservation. The case was remanded to the trial court for further proceedings in accordance with the opinion. The court based its decision solely on its interpretation of the words and language of the Act itself. While we think an opposite interpretation of the Act should be made, still, out of deference and respect for the Wisconsin Supreme Court, we will say that if that court could have had the benefit of all the facts and circumstances surrounding the contemporaneous consideration of Public Law 280, by the same Congress that passed the Termination Act, including the plan of the tribe incorporating a portion of Public Law 280 therein, and its approval by the Secretary of the Interior, in effect making such provisions of Public Law 280 a part of the Termination Act, the decision of that court might well have been different.

Our view is supported by the two decisions in *Klamath & Modoc Tribes v. Maison*, *supra*, and the case of *Oregon v. Pearson*, *supra*. In those cases, which we will refer to as the *Klamath* cases, the tribes had exclusive fishing rights on their reservation which were granted to them by the Treaty of October 14, 1864, 16 Stat. 707, 708 in connection with the creation of their reservation. The treaty provided:

\* \* \* and the exclusive right of taking fish in the streams and lakes, included in said reservation, \* \* \* is hereby secured to the Indians aforesaid: \* \* \*

Nothing was said in the treaty about hunting or trapping. On August 13, 1954, Congress passed the Klamath Termination Act, 68 Stat. 718, 25 U.S.C. §§ 564-64x (1964), which provided:

SEC. 14. \* \* \*

(b) Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty. *Id.* at 722.



Here again, nothing was said about hunting or trapping. However, it should be noted that this Termination Act contained the same general language as is contained in the Menominee Termination Act, which the Supreme Court of Wisconsin said in the *Sanapaw* case cut off the hunting and fishing rights of the Menominees, as follows:

SEC. 18. \* \* \* all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.* [Emphasis supplied.] 68 Stat. 722, 25 U.S.C. § 564q. (1964).

In the *Klamath* cases certain Indians were charged with illegally hunting and trapping wild game on their reservation contrary to the game laws of Oregon. This occurred after the Klamath Termination Act was passed. The same argument was made there (as here) that since there was no mention of hunting or trapping in either the treaty or the Termination Act, such rights, if they ever existed, were cut off by the Termination Act. It was argued that this was especially true since fishing rights were expressly preserved and that if Congress had intended to preserve hunting and trapping rights it would have said so in the Termination Act. But the courts in those cases disagreed with this argument and held that the Termination Act did not cut off the hunting and trapping rights of the tribe. They also held that such rights were specifically recognized by Congress in Public Law 280, and that the members of the tribe had a right to hunt and trap on the reservation without restrictions or control by the State of Oregon.

In the only reported case of the three referred to *infra*, the court concluded as follows:

\* \* \* \* \*

2. Public Law 280, 83d Cong., 67 Stat. 588, 18 U.S.C. § 1162, \* \* \* did not extend the hunting and trapping laws of the State of Oregon to the Klamath Indian Reservation. *Klamath & Modoc Tribes v. Maison*, *supra* at 637.

While the effect of Public Law 280 was specifically mentioned in *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956), no reference to the Klamath Termination Act was made. However, in the unreported *Klamath* case, dated December 10, 1963, the court retained jurisdiction over its previous decision rendered in 1956, and made reference to the Klamath Termination Act by stating that the remaining enrolled members of the tribe, pursuant to treaty, had the unrestricted right to hunt and trap upon their lands. It further expressed the view that withdrawn members of the tribe who continued to be members for purposes of tribal claims against the United States, pursuant to the Klamath Termination Act, had no such privileges. Thus, we have an implicit recognition that the remaining enrolled members of the tribe, subsequent to the effective date of the Klamath Termination Act, retained their right to hunt and trap upon their lands without restriction or control by the state. Furthermore, in *Oregon v. Pearson*, *supra*, the court expressly held that since the Klamath Termination Act did not specifically grant away the hunting and trapping rights, they were retained by the enrolled members without restriction by the State of Oregon.

These conclusions were supported by the Department of the Interior, acting through Glenn F. Emmons, Commissioner of the Bureau of Indian Affairs, when the Commissioner issued a memorandum dated July 2, 1956, on the subject of "Policy of the Bureau respecting the protection and preservation of Indian hunting and fishing rights in termination legislation." This memorandum states:

\* \* \* \*

Following the policy laid down by the Congress in the enactment of the act of August 15, 1953 (67 Stat. 588; Public Law 280, 83d Cong.), the Bureau's policy will be to protect and preserve any right, privilege or immunity with respect to hunting, trapping or fishing afforded to any Indian or Indian group by Federal treaty, agreement or statute in the planning and execution of readjustment programs, including the seeking of legislation necessary to carry out such programs.

Section 2 of the act of August 15, 1953, *supra*, states the policy of the Congress concerning the protection and preservation of Indian hunting and fishing rights. It provides that nothing in the act shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty, agreement or statute with respect to hunting, trapping or fishing or the control, licensing or regulation thereof.

\* \* \* \*

The memorandum then mentioned the decision in *Klamath & Modoc Tribes v. Maison*, *supra*, with approval by stating that it would follow the interpretation of Public Law 280 as made by that case unless changed by other court decisions, saying:

It thus appears, from the only judicial interpretation of the act which has been made, that the intention of Congress was to preserve and protect both express and implied rights, privileges and immunities afforded under Federal treaties, agreements, or statutes with respects [sic] to hunting, trapping and fishing. This Bureau will accept the interpretation of the statute as made by the courts and lend such assistance as is possible in preserving and protecting hunting and fishing rights of the Indians.

\* \* \* \*

It thus appears that the Commissioner fully understood and agreed that Public Law 280 preserved and protected

hunting and fishing rights of Indians who were the subject of Termination Acts, such as the Menominees.

The question before us seems to have been laid to rest by the Supreme Court in the case of *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). In that case, Congress authorized the Secretary of the Interior in 1891, to prescribe rules and regulations governing the Metlakatla Reservation in Alaska. Acting under this authority, the Secretary issued regulations in 1951, allowing the Metlakatlas to use fish traps in the waters around their reservation. After Alaska became a state, it passed an anti-fish-trap law in 1959, and sought to enforce it against the Metlakatlas as to the waters surrounding their reservation. Mr. Justice Frankfurter, in speaking for the Supreme Court decided the case adversely to the state on the basis of Public Law 280 by saying:

In 1958, 72 Stat. 545, Alaska was added to the list of States and Territories permitted to exercise civil and criminal jurisdiction over Indian reservations. The State has not argued that this took away the power of the Secretary of the Interior to make regulations contrary to state law. Appellant has argued, to the contrary, that the statute expressly preserved Indian fishing rights from state laws. The statute granting States civil and criminal jurisdiction was passed in 1953, 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. Subsection (b) of 18 U.S.C. § 1162 provides that nothing therein shall authorize alienation, encumbrance, or taxation of Indian property, "or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

*This statute expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, but only those fishing rights and privileges given by federal treaty, agreement, or statute. [Emphasis supplied.]*  
*Id.* at 56.

Of course, fishing rights were emphasized in that case, but, obviously, if hunting or trapping right had been involved, the same result would have been reached as to them, since they are all treated together in Public Law 280. The Supreme Court upheld the right of the Metlakatlas to use fish traps in the waters around their reservation free from any interference by the fish-trap laws of the State of Alaska, thereby extending the protection of Public Law 280 to "regulations", in addition to "treaty, agreement or statute," although regulations are not mentioned in the statute.

When applied to the case before us, the holding of the Supreme Court in the *Metlakatla* case as quoted above, "This statute [Public Law 280] expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, \* \* \*," clearly recognizes and establishes the right of the Menominees to hunt and fish and trap on their reservation free from interference by the game laws of the State of Wisconsin.

## V

If the rights of the Menominees to hunt and fish on their reservation free from regulation by the state's game laws have been interfered with, it is due to the action of the State of Wisconsin acting through its Supreme Court and law enforcement officers and not because of any act of the United States. Consequently, any complaint they have on that score should be against the State of Wisconsin and not against the Federal Government. In extending the jurisdiction of its game laws over the Menominee



Reservation, Wisconsin was acting as a sovereign state wholly independent of any authority granted to it in this respect by the United States. In so doing, it was not an agent of the Federal Government and the Government is neither responsible nor liable for its improper acts. *Cf. D. R. Smalley & Sons v. United States*, Ct. Cl. No. 422-65, decided February 17, 1967.

It may be argued that the conflict between our holding in this case and the decision of the Supreme Court of Wisconsin in the *Sanapaw* case, *supra*, leaves the Menominee Indians in an impossible position. This does not necessarily follow. They have the same remedy, among others, that the Quillayute Tribe of Indians had in the case of *United States v. Moore*, 62 F. Supp. 660 (W.D. Wash. 1945), *aff'd*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947). There, an injunction suit was filed by the United States on behalf of the tribe to restrain state conservation officers, namely the Directors of Game and of Fisheries of the State of Washington, from enforcing the state's game laws on the Quillayute Indian Reservation. The trial court granted the injunction and decreed that the defendants were "permanently enjoined, restrained, and debarred from interfering in any manner with or asserting any jurisdiction or control whatsoever over fishing activities" of the tribal members on their reservation. *Id.* at 761.

On appeal the court held that in the creation of the reservation "sufficient for their [the Indians] wants" the United States preserved the area in controversy for the exclusive use of the Indians and it was not subject to the fish and game laws of the state. *Id.* at 763-64.

## VI

In summary, we hold: (1) the Treaty of Wolf River in 1854 granted exclusive hunting and fishing rights to the Menominees on their reservation free from outside regu-

lation; (2) the Menominee Termination Act of 1954 did not abrogate or cut off such hunting and fishing rights, and even though the Supreme Court of Wisconsin erroneously, in our opinion, construed the Act to terminate such rights, this does not create liability against the United States; (3) the Menominees, therefore, who are enrolled as members of the tribe on its records in accordance with the Termination Act, have, own and possess at the present time the exclusive right to hunt and fish on their reservation free from restriction, regulation, or control by the State of Wisconsin; and (4) the petition of the Menominees, having failed to state a cause of action against the United States, is hereby dismissed.

Accordingly, defendant's motion for summary judgment is granted and plaintiffs' petition is dismissed.

DURFEE, *Judge*, dissenting:

In *Wisconsin v. Sanapaw et al.* 21 Wis. 2d 377, 124 N.W. 2d 41 (1963), *cert. denied*, 377 U.S. 991 (1964), *rehearing denied*, 379 U.S. 871 (1964), the Wisconsin Supreme Court held that Congress by its enactment of Section 10 of the Menominee Termination Act of 1954 ended plaintiff's unregulated hunting and fishing and brought them within the purview of the state's game laws. See 68 Stat. 250, 25 U.S.C. § 899 (1964). The state court found that the state's asserted regulation of the Indians was derivative of Federal statutes and that the Indians had no claim against the state. The majority of our court now decides the reverse; that is, that the Termination Act "did not abrogate the exclusive hunting and fishing rights of the Menominees on their own reservation, but actually preserved and protected them." The court means that any future complaint by the Indians for violation of their hunting and fishing rights is against the State of Wisconsin and not the Federal government. Each court has told the Indians that they have rights, but not

in the deciding court. Thus, the Indians have won both contests, but each time on the wrong playing field and against the wrong opposition.

This court's decision leaves plaintiffs in a state of legal weightlessness. While each court has held that the other court's government is responsible for plaintiffs' condition, neither is able to enforce its finding. The Wisconsin Supreme Court cannot make the Federal government compensate the Indians. And this court is unable to stop Wisconsin's enforcement of state game laws, even though we say the Indians are not subject thereto. Thus, if there is no appeal of this court's decision, plaintiffs may never have their dilemma effectively resolved. Their situation will not be the common one of the party who finds himself with conflicting decisions in several Federal circuit courts. Rather it will be akin to the situation of Alphonse and Gaston where two courts tell each other that any further resolution of the dilemma belongs to the other's docket. The result is that neither court takes further action, and the Menominee Indian who tries to exercise his ancient hunting and fishing rights on his own reservation winds up in jail.

The predicament of plaintiffs does not have to remain insolvable. The majority opinion presents one solution. It recommends that plaintiffs seek, in a Federal district court, an injunction against the State of Wisconsin preventing it from enforcing its game laws. This suggestion is fraught with drawbacks; the most minor one being the possibility that the injunction will not be granted. Of major consequence are the difficulties connected with Federal action against state officials in the functioning of their duties. It suffices to say that the problems arising out of *Ex Parte Young* 209 U.S. 123 (1908) and its progeny make me very chary of Federal injunctions issued against state functions. See, generally, Hart & Wechsler, *The Federal Courts and the Federal System* 814-890; De-

*developments in the Law—Injunctions* 78 Harv. L. Rev. 994, 1045 (1965); Wright, *Federal Courts*, 348. Cf. *Martin v. Creasy*, 360 U.S. 219 (1959).<sup>1</sup>

A more obvious solution to plaintiffs' difficulties would be a grant of certiorari by the Supreme Court and a resolution of the conflict between the state and Federal courts' decisions. However, the United States Supreme Court has already denied certiorari in the Wisconsin Supreme Court Indian case, and in the *Klamath Indian* case cited by the majority herein to the same effect as our present opinion.

In situations like this, at least two other approaches—comity and certification—are available to assist in resolving the Indians' predicament. These legal vehicles contain a greater degree of certainty than either certiorari or injunction. For, with them, the resolution of the conflict between the courts is not left to a later court's acts, but is handled while the case is still within this court's jurisdiction. Even though the conflict between the courts would be resolved in this court, neither of the two additional approaches require as thorough handling of the merits of the case as the majority does. Thus by doing less in the handling of the case, this court could do more to resolve plaintiffs' situation.

The first of these approaches—comity—would mean the acceptance by this court of the decision of the Wisconsin Supreme Court. Acceptance of the state court's decision does not mean that the process is automatic, that there is no inspection of either the present case or the state's decision. That approach would relegate the court to being

<sup>1</sup> The problems in this area were passed over without comment by the court in *United States v. Moore*, 62 F. Supp. 660 (W.D. Wash. 1945); *aff'd* 157 F. 2d 760 (9 Cir. 1946); *cert. denied*, 330 U.S. 827 (1947, the case cited by the majority to support the suggestion of an injunction. In that case, plaintiff requested an injunction. After holding for plaintiff on the law, the court decided that it should grant plaintiff's request.

a mere rubber stamp or a judicial conduit. Not only would that possibly saddle the court with an unsound decision, but also it would mean an abdication of duty. In this case, the thought of comity should not arise until one believes that he is not without doubt on the question of whether or not the Menominee Termination Act cancelled hunting and fishing rights of the Indians. The next step is to inspect the state court decision to see if it is reasonably derived. With a positive answer to this inspection, one would use comity and leave the final resolution to a higher court. *Mast, Foos & Company v. Stover Manufacturing Company*, 177 U.S. 485, 488-89 (1900); *Sanitary Refrigerator Company v. Winters, et al.* 280 U.S. 30, 35 (1929).

The second approach available to courts whose resolution of an issue is not fixed is the seldom used process of certification. Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 Va. L. Rev. 1, 46-50 (1949). 28 U.S.C. § 1255(2) provides that "[c]ases in the Court of Claims may be reviewed by the Supreme Court \* \* \* [b]y certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon certification the Supreme Court may give binding instruction on such question." The sporadic use of certification is not due to its lack of success. For, when used, it has been beneficially employed. See *Williams v. United States*, 289 U.S. 553 (1933) and *O'Donoghue v. United States*, 289 U.S. 516 (1933) (both certifications from the Court of Claims). Use of certification in this case should not augment the fears held by many that an extensive use of this right could unduly enlarge the Supreme Court's obligatory jurisdiction. This is not the case where a court is trying to conceal an obligatory appeal in another guise. There is no wolf in sheep's clothing. Certification is put forth so that this court could make every possible effort to arrive at a sound adjudication of a case that presents a



troubling issue of law augmented by the possibility of a never-solved conflict between Federal and state courts that would deprive plaintiffs of a final, meaningful resolution of their suit. The Menominees are either entitled to their hunting and fishing rights under the Treaty or they are entitled to damages because these rights have been taken away, and certification would guarantee one of these decisions and not a meaningless hybrid.

Between comity and certification, I favor the latter approach because it seeks guidance from a higher court rather than looks backwards to a lower court as comity does. Therefore, rather than reach a decision on the merits of the case at this time, I would have certified the following question to the Supreme Court: Did the Menominee Termination Act of 1954 cancel the hunting and fishing rights of plaintiffs on their reservation and thereby subject them to the game laws of the State of Wisconsin as if they were non-Indian citizens of the state?

The history of the Menominee Tribe does not read well for the conduct of the United States. Again and again the Tribe has had to sue the Federal government in this court to recover damages to which they were entitled. Recently, a committee of the Congress referred to this court as "the keeper of the nation's conscience." If the court is to continue to deserve this title, we must now see to it that before the Federal government finally closes its books on the old Menominee Tribe, the last page is written with honest justice for them and for their rights.

LARAMORE and COLLINS, *Judges*, join in the foregoing dissent.

## APPENDIX B

## TREATY OF MAY 12, 1854 (10 Stat. 1064)

*Articles of agreement made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, superintendent of Indian affairs, duly authorized thereto, and the Menominee tribe of Indians, by the chiefs, headmen, and warriors of said tribe—such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight.*

Whereas, among other provisions contained in the treaty in the caption mentioned, it is stipulated that for and in consideration of all the lands owned by the Menominees, in the State of Wisconsin, wherever situated, the United States should give them all that country or tract of land ceded by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of the second of August, eighteen hundred and forty-seven, and by the Pillager band of Chippewa Indians in the treaty of the twenty-first of August, eighteen hundred and forty-seven, which had not been assigned to the Winnebagoes, guaranteed not to contain less than six hundred thousand acres; . . .

And whereas, upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, upon Crow Wing, which had been assigned them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers.

Now, therefore, to render practicable and stipulated payments herein recited, and to make exchange of the lands given west of the Mississippi for those desired by

the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into.

ARTICLE 1. The said Menominee tribe agree to cede, and do hereby cede, sell, and relinquish to the United States, all the lands assigned to them under the treaty of the eighteenth of October, eighteen hundred and forty-eight.

ARTICLE 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being township 28, 29, and 30, of ranges 13, 14, 15, and 16, according to the public surveys.

\* \* \* \*

In testimony whereof, the said Francis Huebschmann, superintendent as aforesaid, and the chiefs, headmen, and warriors of the said Menominee tribe, have hereunto set their hands and seals, at the place and on the day and year aforesaid.

Francis Huebschmann, [L. S.]  
Superintendent of Indian affairs.

## APPENDIX C

MENOMINEE TERMINATION ACT OF 1954,  
AS AMENDED (25 U.S.C. §§ 891-902)

## § 891. Purpose

The purpose of sections 891-902 of this title is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.

\* \* \* \*

## § 893. Membership roll; closure; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: . . . When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe.

\* \* \* \*

**§ 896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register**

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. . . . The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. . . .



**§ 897. Transfer of property**

On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. . . .

**§ 899. Publication of proclamation of transfer of property; termination of Federal services; application of Federal and State laws; citizenship status unaffected**

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of the status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States. . . .

## APPENDIX D

DECISION OF THE SHAWANO-MENOMINEE  
COUNTY COURT, BRANCH NO. 2,  
MENOMINEE COUNTY DIVISION

November 1, 1962

The issues of this case are very clearly drawn. It is the contention of the state as outlined in the opinion of the Attorney General and oral argument by District Attorney Fritz Eberlein of Shawano-Menominee County,

(1) That the right of hunting and fishing were not granted and not included in the treaties of 1854 and 1856.

(2) That Congress has plenary powers to deal with the Indians and may abrogate Indian privileges and rights, including treaty rights, by statute. Further that the lands here involved are part of the public domain.

(3) That Public Law 399 and supplementary acts terminate the hunting and fishing privileges heretofore enjoyed by Menominee Indians within what was formerly the Menominee Indian Reservation, now Menominee County.

The defense contends,

(1) That the treaty of 1854 provides that the lands are to be held as Indian lands are held.

(2) That the treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.

(3) That the termination act (assuming that Congress had the right to terminate hunting and fishing privileges) did not by its terms so provide. That the tribe according to the act still exists as such and likewise all lands and property of the tribe is now held by the enrolled members

of the tribe as the only stockholders of the Menominee Enterprises, Incorporated, who according to the act were the designated recipients by the tribe. That the members of the tribe have the right to quietly enjoy hunting and fishing and dwelling thereon free from molestation from the United States and it follows that the State of Wisconsin lacks jurisdiction to enforce the hunting and fishing laws in Menominee County.

The briefs and opinion submitted are exhaustive and complete as to adjudication of somewhat similar issues in both federal and some state courts. The facts of this case present issues not definitely passed on by our courts.

The court is of the opinion that it is apropos to the issues herein to discuss the historic background.

It seems that all lands on this planet suitable for habitation and survival was occupied by certain ethnic groups. Curiosity and a means of travel resulted in what history has called discovery of new continents. If the Indians of North America had landed in Europe it no doubt would have been called an invasion. Columbus in a rather touching ceremony took possession of some islands in the West Indies for Queen Isabell of Spain. Some gold was brought back to Spain and then the disease of discovery spread. France got into Canada and the Northwest Territory and later what was called the Louisiana Purchase. Spain took possession of Cuba and various areas in South America and what is now known as Florida. England staked out claims on the North American continent from Maine to Florida. The Dutch obtained a rather uncertain rights in New York and made history by purchasing Manhattan Island for the sum of \$24. At the times of the various nations above referred to attempted to take possession and colonize their respective areas of the North America continent and subsequent thereto it was apparent that practically the entire North American continent was occupied by aborigines, later called Indians. It is true that the

population and occupancy of the continent was not dense, but the fact did remain that there was a consistent occupation of all areas; that there were areas between the varying tribes, and there were many of different size and numbers, which area was more or less fought about and disputed by the Indians for hunting and fishing grounds, but that the pattern of occupancy was more or less consistent and that they regarded certain areas as their own private domain and at that time and subsequently thereto maintained that they had the title to said lands and the inherent right of hunting and fishing, which with some slight agriculture was their means of livelihood. The seaboard colonization proceeded rapidly until the time of the American Revolution which determined the colonies as an independent nation. Colonization and possession of lands for use of settlers proceeded systematically and fundamentally by power and strength of what we might call the colonist invaders. Firearms, of course, played a very important part. History indicates that William Penn recognized the title of the Indians and did negotiate a purchase. At this point it could be well remembered that purchasing the land from the Indians in reality meant nothing. What few dollars or goods that were paid was a poor substitute for the loss of their lands and in no way changed their method of life. It might be pointed out merely for the basis of comparison that the European countries colonizing Africa and staking out claims thereon were not as successful as in their occupancy of the North American continent, primarily perhaps because of the density of population in the African area, and we today see these countries withdrawing and leaving the title and possession of the claimed land entirely in the hands and under the control of the inhabitants of the respective areas.

After the Revolutionary War the expansion of settlers to the West, part by natural increase and others by immigration spread most rapidly west to the Mississippi River, and we might point out that colonization or expansion by

movement of settlers took possession of what lands or locations they wanted independent of claims of title thereto on the part of Indians. It was somewhat prior to 1848, which date Wisconsin was admitted to the Union, that specific issues between Indians and White settlers and the United States Government took a marked change as to rights. We are now to the point where Indians are displaying a certain type of anxiety, desire of maintenance of rights to the land so that there were issues which could no longer be passed because of the insistence on the part of the Indians and the potential threat of possible bloodshed where settlers were moving in on definitely proclaimed Indian lands.

The Memoninee Indians at this time were definitely located in Wisconsin, and from what transpired it is very apparent that the Menominee Indian chiefs fully recognized the problem and were more or less compelled to negotiate a treaty, and it must be very apparent that at this time the Menominee chiefs recognized what had transpired from the Atlantic seaboard to the Mississippi River, and that unless they could negotiate some suitable agreement that they would be pushed out of the Wisconsin area, which to them was an exceptional area for wild-life, fish and fertility of soil.

History does not record the respective details of the transaction though there is enough in written nature to understand the background and motives of the bargaining that took place.

It must be remembered that the expansion from the Allegheny Mountains to the Mississippi River was fraught with many encounters, claims and counterclaims, and the occupation by might, and that the government during this time became more and more and more alert to the necessity of allocations of tribes to certain areas, and from the Indian viewpoint at the conference table it made survival a way of life and that the area to which they were to be concentrated or moved to must be sufficiently prolific to



provide for their sustenance. It is fair to assume that the treaty contracting parties were aligned, one with the background of power and force, and the other with a plea for protection from enemies and opportunity to maintain their way of life.

A treaty was drawn, and it must be remembered, also, that in the Indian's mind had been built up a picture of the great White Father at Washington who in all matters according to Indian lore and mind was the essence of fairness and right. Just what in substance was the contract or treaty between the contracting parties? On the one hand the Indians released or quit claimed or gave warranty deed according to their custom to the federal government of millions of acres of land. How much of the State of Wisconsin has not been disclosed, but it is only fair to assume that many million acres were included, for which in return they were to receive a tract of land of some six hundred thousand acres. According to records the government attempted to give them land across the Mississippi. This held up the transaction because of inspection on the part of Indians, and it was disclosed after examination that that was entirely unsuitable for Indians purposes and livelihood, and that the government agreed to protect them from their enemies and protect them in their right and claim to this land. It was theirs before the treaty but by the treaty the government guaranteed it to them as against all others and agreed to hold it in trust, they to act as guardian or trustee, the Indians to be wards of the government, the government to supervise and no doubt assist as has later proved to be the policy that must have been the outgrowth of the government's obligations under the treaty.

It is obvious that the government negotiated from a power-laden hand and if the transaction were to be regarded on a mutual monetary basis it would seem that the Indians were substantially short-changed. The lands that the government received was promptly a part of the

public domain and was deposed by the government as such. It would appear that the land reserved which is now Menominee County never became a part of the public domain. It would, also, appear as progress and changes in life and methods of living proceeded through the years that the Indians became a problem and that the government had to assist more than was originally anticipated and that the Indian's way of life could not entirely support him and it became quite costly for the government to continue the supervision agreed upon, and now the picture has definitely changed to the point that the government acting through its Congress was hopeful to unload their responsibilities, and again at the so-called conference table Public Act 399 resulted in what may be called another treaty with the Indians. The act speaks for itself. In reading it and the foregoing resolutions before the act was passed indicate that hunting and fishing privileges and the Indian way of life were calculatingly omitted. To the Indian today it appears that the government drove a sharp bargain or was trying to enlarge the benefits for other Wisconsin citizens by permitting others to enjoy the hunting and fishing privileges. It is this point that brings to a crisis that issue.

Shortly after the 1848 period as settlers consistently and persistently moved westward across the Mississippi the Indians in the West recognized the slow and deadly push resulting in loss of hunting grounds and a forced change into a way of life that we find open rebellion, antagonism and the Indians in conflict attempting to maintain their rights and title. Teddy Roosevelt in his famous book *THE WINNING OF THE WEST* does not correctly portray the one-sided conflict in which power and the authority and the decisions of the government were maintained by force; resulting in considerable bloodshed but with the victory on the part of the government and the Indian now trying in various areas to recoup financially what he lost territorially.

In dealing with the problem from its very origin to date it, of course, was the Congress that set the pace by legislation. Originally Indian problems were solved by treaty. As we understand a treaty it is a formal agreement between two or more nations relating to peace, alliance, trade, etc. Contract generally speaking may be broken by either party but the party so doing can naturally be held in damages that result from a breach.

Congress determined that Indian matters would be handled by acts of Congress. Future treaties were out, but existing treaties should be inviolate unless changed by mutual consent. In this way no longer were Indian tribes treated as individual nations, but rather as American subjects entirely dependent on the grace of the fairness of Congressional action. So it became a government by statute covering Indian problems. The courts seem to have sustained this view in a certain respect as some of the decisions indicate that Congress had the plenary power over Indians and Indian lands. To this court it looks as if Congress grasped the crown and maintained its position by this method of power and that all supervision, privileges, rights were entirely within the grace of Congress. If this is the correct theory and right of procedure it would seem that the only saving grace for the Menominee tribe and their reservation is that their treaty is inviolate and that their rights to the Menominee Reservation, now Menominee County, arises from said treaty and cannot be changed without their consent nor by any unilateral act of the Congress. This position the courts have approved as indicated in decisions hereinafter referred to.

The position of the state and the defense are practically at direct variance. In the supplemental opinion or brief of the Attorney General it is seriously contended that the entire issue revolves around the fact that the Menominee Reservation prior to the treaty hereinbefore referred to was part of the public domain and that the

state's position rests firmly on this ground. Let's view this position in the atmosphere and facts surrounding the treaty of the government with the Menominees. It does not specifically appear from the evidence in this case whether the Menominee Reservation so to speak was included in the grant from the tribe to the government. Nor is the court able to determine whether the state's position is that it was included in the treaty but because of the delay of two years in selecting a proper location satisfactory to the Indians that the Menominee Reservation during that interim became a part of the public domain. It appears to this court without even the slightest of doubt, first, that the title to the Reservation originally vested in the Indians and that the essence without even a serious doubt of the treaty entered into contemplated and intended that even if the lands were granted to the government the government returned them with the incident of hunting and fishing included. Any other view of what transpired is inconsistent with all the factual bargaining and understanding between the parties. It was definitely understood that the Indians were to receive the right and title in the same absolute position as they originally held it. Their way of life, hunting, fishing and limited tilling of the soil, was the entire essence of the treaty, the government guaranteeing this and, also, agreeing to protect them from enemies and to supervise them.

It would be unworthy of our government to take any other position. It must, also, be remembered that since the creation of the reservation up to the date of termination the Indians exercised the complete right of supervising their own hunting and fishing regulations without regulation or prohibition of any kind on the part of the government. At this point we wish to point out for whatever it is reasonably worth that the Menominee lands were designated as the Menominee Indian Reservation. The very term "reservation" indicates that it was land reserved by them for their use.



The Indians never having, therefore, granted away their inherent aboriginal right of hunting and fishing therefore still possess those rights, not only up to the time of termination but as we will conclude later even after termination. Authority for this position is well-founded in the treaty itself and several decisions of both the United States and state courts. While there are many others that touch upon this right, perhaps the most important first is a provision in the Treaty of 1854. Article 2 provides as follows:

"In consideration of the foregoing cession the United States agrees to give, and do give the said Indians for a home, to be held as Indian lands are held that tract of Country lying upon the Wolf River in the State of Wisconsin."

The 1854 treaty then designated a "reservation" for them "to be held as Indian lands are held." Thus, the Menominee Tribe has continuously exercised the exclusive and unlimited hunting and fishing rights in question. The 1854 treaty being characterized by the parties as "supplementary and amendatory to the treaty" of 1848, merges the treaty of 1848 so that there is no proper basis for saying that the tribe ever did actually lose its rights in the land ceded.

The fact that no express retention or grant of exclusive and unlimited hunting and fishing was set forth in either treaty does not alter the conclusion, this principle was well stated by the solicitor of the Department of Interior as follows,

"The examination of various treaties between the United States and the Chippewa Indians disclosed that while the right of the Indian to hunt and to fish on ceded land was reserved in some of the earlier treaties . . . no reservation of the right to hunt and to fish was made with respect to the unceded lands of the Red Lake Reservation, but such a reservation was not necessary to preserve the right of the lands



reserved or retained in Indian ownership. *The right to hunt and to fish was a part of the larger rights possessed by the Indians in the land used and occupied by them.*"

Such right was, "*not much less necessary to the Indian and his existence than the atmosphere they breathed remained in them unless granted away,*" United States vs. Winans, 198 United States 371, (OP., Acting Sol. IDM 28107, June 30, 1936).

The United States Supreme Court stated in United States vs. Winans, 198 United States 371, 381 (1905),

"The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians . . . the reservation where in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein they imposed a servitude upon every piece of land as though described therein and the right was intended to be continuing against the United States and its grantee as well as against the State and its grantee."

The Supreme Court of the State of Wisconsin in a case involving the Chippewas cited as State vs. Johnson, 212 Wis. 301; 249 N. W. 285, held as follows:

"While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they theretofore enjoyed we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to the lands reserved to them at the time the treaty of 1854 was entered into and was not a shadow of impediment upon the hunting rights of the Indians on the lands retained by them, *The Treaty was not a grant of rights to the Indians but a grant of rights from them*, a reservation of those not granted. (U. S. v. Winans, 198 U. S. 371, 25 S. Ct. 662, 664; 49 L. Ed. 1089) We entertained no doubt the rights of Indians to hunt and fish upon their lands continued."

We will now consider whether the termination act, Public Law 399 and the subsequent amendments thereto, in any way limits the rights of the tribe as to their hunting and fishing privileges. It is the opinion of the court, first, that the Congress did not have a right to terminate or change the rights obtained by treaty. But if this opinion is differed with, may we point out that the act is strangely silent and neither directly or indirectly according to a fair interpretation of that act are the hunting and fishing privileges terminated. The preamble of the act provides,

"The purpose of this act is to provide for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."

Section 7 reads in part as follows,

"... the responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof because of their status as Indians, shall cease on December 31, 1960 or on such earlier date as may be agreed upon by the tribe and by the secretary. The termination plan shall contain provisions for protection of the forest on a sustained yield basis and for the protection of water, soil, fish and wildlife."

The provisions of Section 7 providing that the termination plan shall contain provisions for the protection of the forest on a sustained yield and for the protection of water, soil, fish and wildlife, definitely indicates that soil, fish and wildlife are to be protected or reserved and this definitely indicates that this was considered and it naturally follows that it must be for the benefit of the tribe.

Section 8 directs that the Secretary of the Interior to transfer to the tribe the title to all property real or personal that is held in trust by the United States for

the tribe, and specifically authorized the formation of a corporation for the purpose of taking title to all tribal lands and assets and enterprises owned by the tribe or held in trust by the United States.

The termination act did not eliminate exclusive hunting and fishing rights owned by the Menominees under the treaties of 1848 and 1854.

By termination the government saved the cost of supervision and so forth. This became a costly and serious obligation as time went along under the terms of the treaty. The termination on the part of the government is based not alone to obviate the costs of supervision, but also on the factual assumption that in today's modern way of living they are self-sustaining, that during years of supervision the government has so advanced and prepared them.

Almost any day in this court the silent tragedy continues. Young Indians, both male and female, and even the older ones with no employment supplement the modern way of life by theft and pawning. Fiscal aid by the government since termination is self-evident that the termination was premature. Hunting and fishing is not in itself a sufficient supplement to the modern way of life, but it does help.

The right of hunting and fishing is more important and vital to the Menominee than the right of all of Wisconsin or United States citizens to invade it.

The termination act provides in substance among other things that the property be conveyed or assigned as agreed on by the Menominees. Actually a corporation was formed designated as Menominee Enterprises, Inc., its stockholders being the enrolled members of the tribe at the time that the rolls were officially closed. The reservation therefore, was not actually allotted but it is still owned by the tribe. This mere conveyance is not a con-

veyance to a third party but to the Indians themselves. It should, also, be noted that there is provided in the act a way of life for the Indians by provision that the property be operated on a sustained yield. The other way of life, namely by hunting and fishing, is not in any way referred to. But the inclusion of the sustained yield is indicative that the termination act was intended to solidify the tribe in their holdings and in their use. We must, therefore, conclude that the termination act in no way terminated the hunting and fishing rights that are now at issue in this case.

As we have heretofore pointed out this issue has been the subject of controversy, litigation and decision on the part of both state and federal courts. One of the most recent decisions which this court feels embodies the facts and the principles of law involved is the case of the State of Oregon vs. Harry Pearson determined in the District Court of the State of Oregon for the County of Klamath. The defendant was accused of illegal possession of deer meat in the County of Klamath within the area formerly known as the Klamath Indian Reservation without having obtained a deer tag for the possession thereof. Quoting from the opinion as follows:

"The question was whether the individual Indians who were members of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, hereafter referred to as the Klamath Indians, retain the right to hunt subsequent to the Klamath Termination Act as amended. (Title 25 U. S. C. A. 564).

"In aboriginal times up to the coming of the white man and through the period of recorded history, the Indians known as Klamath and Modoc Tribes and the Yahooskin Band of Snakes, as individuals possessed, according to their culture, a large portion of the states of Oregon and California and the right to hunt without restriction or control except that imposed by themselves was included in such possessions, ac-

according to their culture. The right to hunt was a substantial portion of their subsistence, and inured to succeeding generations up to and including the period following the treaty of 1864 and was practiced by members of the reservation up to the present time."

In the opinion the court quoted extensively the decision of State of Wisconsin vs. Johnson, 212 Wis. 301. Also the United States vs. Winans, and the court's concluding opinion is as follows,

"The case of United States vs. Winans and the above mentioned case both sustained the theory which this Court adopts that right or duties imposed on the Indians herein were not grants to them but from them to the government; therefore, that they have not granted away they still possess and any substantial right or possession, such as hunting, cannot be taken away by implication. Since the Klamath Termination Act as amended did not specifically provide for a grant away of the hunting and trapping rights with due and proper consideration therefore, it is the conclusion of this Court that they are still retained by the enrolled members only and they can exercise their heritage to hunt and trap within the areas of the former existing Klamath reservation without restriction by the State of Oregon."

In accordance with the foregoing opinions this court is of the opinion that the State of Wisconsin is without jurisdiction and that the defendants are not guilty of the crimes charged. Formal motion for dismissal and discharge of the defendants will be heard November 8, 1962, at 2:30 p.m.

Dated: November 1, 1962.

BY THE COURT:

R. H. FISCHER  
County Judge



## APPENDIX E

DECISION OF THE SUPREME COURT OF  
THE STATE OF WISCONSIN

November 1, 1963

ERROR to review two judgments of the county court of Shawano-Menominee counties: R. H. FISCHER, Judge. *Reversed.*

Criminal prosecutions by the state against defendants Joseph L. Sanapaw; William J. Grignon, and Francis Basina for violation of certain game laws.

The actions were commenced by complaint and warrant. Sanapaw and Grignon were charged together in one complaint, while Basina was charged singly in a separate complaint. All three were charged with hunting deer with the aid of an artificial light in violation of sec. WCD 10.10 (2), Wis. Adm. Code, and with transportation of a loaded and uncased gun in an automobile in violation of sec. WCD 10.07 (3), Wis. Adm. Code. Sanapaw and Grignon were charged with having committed their offenses on September 8, 1962, and Basina was charged with having committed his on September 9, 1962. Pleas of not guilty were entered. Defendants admitted, and the court found, that the alleged violations were in fact committed. The court, however, found defendants not guilty because they were enrolled members of the Menominee Indian Tribe and the state had no jurisdiction to enforce its hunting and fishing regulations against them.

The court, pursuant to sec. 958.12 (1) (d), Stats., granted the state permission to prosecute writs of error to review the judgments of acquittal. By agreement of the parties the two writs of error have been submitted together because the cases present a common question of law.

CURRIE, J. The question presented by the writs of error is:

Upon termination of federal supervision and control over the Menominee Indian Tribe and the Menominee Indian Reservation, did the enrolled members of the Tribe and their lands become subject to the same Wisconsin game laws as other persons and lands within the state?

In order to resolve this question it is necessary to review the pertinent historical facts. These commence with the treaty of October 18, 1848, between the United States and the Menominee Tribe (9 U.S. Stat. at L. 952). By this treaty the Menominees ceded, sold and relinquished to the United States "all their lands in the State of Wisconsin wherever situated."<sup>1</sup> The treaty further provided that, in consideration for this cession, the United States give the Indians "for a home, to be held as Indians' lands are held" a large tract of land west of the Mississippi river, and that the Menominees "shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof and until the President shall notify them that the same are wanted." In 1850 an exploring party found that the lands west of the Mississippi were unsuited to the Menominees' circumstances. As a result they then petitioned the President for permission to stay longer on the ceded lands. Thereafter, Elias Murray, Superintendent of Indian Affairs, accompanied by three of the Menominee chiefs, explored lands on the Wolf and Oconto rivers in

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<sup>1</sup>The boundaries of the area ceded to the United States under this treaty, which form a wedge-shaped tract located in east-central Wisconsin, are shown on Map "Wisconsin 1," Royce, *Indian Land Cessions*, Part 2, H. R. Doc. No. 118, Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution (1896-1897). The figure 271, which is superimposed upon this area of the map, is explained at pages 780-781. The approximate boundaries of this area are also shown on a smaller map appearing in Raney, *Wisconsin—A Story of Progress*, at page 78.

Wisconsin, and Murray recommended as a home for the Menominees a tract 30 by 18 miles, comprising fifteen townships.<sup>2</sup>

By further treaty made on May 12, 1854 (10 U.S. Stat. at L. 1064), the United States ceded to the Menominees a tract 24 by 18 miles on the Wolf river, consisting of twelve townships, "to be held as Indian Lands are held."<sup>3</sup> This 1854 treaty stated that its articles were "supplementary and amendatory" to the 1848 treaty. By the 1854 treaty the Menominees ceded back to the United States all lands west of the Mississippi. In 1856 the Menominees sold to the Stockbridge Indians two of their twelve townships. The remaining ten townships thus constituted the Menominee Indian Reservation. This reservation continued in existence until the "Termination Act" (68 U.S. Stat. at L. 250, as amended, 70 U.S. Stat. at L. 549, 72 U.S. Stat. at L. 290, 74 U.S. Stat. at L. 867; 25 U.S.C. secs. 891-902), passed originally by congress in 1954, became effective by the Secretary of Interior's proclamation of April 29, 1961 (26 Fed. Reg., No. 82, April 29, 1961, at page 3726). This proclamation proclaimed the transfer (pursuant to sec. 899 of the Termination Act) of all tribal property held in trust by the United States government, and the termination of all federal supervision and control over the Menominee Indians and the Menominee Indian Reservation effective midnight April 30, 1961. Title to the lands comprising the former Menominee Indian Reservation is now held by Menominee Enterprise, Inc., a Wisconsin corporation incorporated on January 23, 1961. The capital stock of this corporation is held in a voting trust for the benefit of the members of the Men-

<sup>2</sup> These facts are set forth in Menominee Tribe of Indians (1942), 95 Ct. of Cl. 232.

<sup>3</sup> This tract, less the two townships later sold to the Stockbridge Tribe, is shown on the Map designated as "Wisconsin 2" of Royce, Indian Land Cessions, referred to in footnote 1, and is designated on the map by the numeral 322.

ominee Indian Tribe. The acts committed by defendants which led to the instant criminal prosecutions occurred on these lands.

In view of the foregoing history we are faced with the preliminary question of whether, at the time the Termination Act became effective, the Menominees had exclusive hunting rights free from the state's game laws which arose either by reservation under the 1848 treaty (as modified by the 1854 treaty), or by cession under the 1854 treaty.

This court in *State v. Johnson* (1933), 212 Wis. 301, 249 N. W. 285, citing *United States v. Winans* (1905), 198 U.S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, held that where Indians cede part of their lands by treaty and retain other lands, for their own use, as to which no government patents have ever been issued, their rights to fish and hunt on their retained lands, without being subject to the state's fish and game laws, continue even though the treaty contains no express reservation to that effect. We do not consider, however, that this principle has any application to the instant cases for two reasons. First, on the record before us, we cannot determine whether the lands where the alleged offenses were committed were part of the lands then owned by the Menominees at the time of the 1848 treaty. Only part of the former Menominee Indian reservation was included in the tract ceded to the United States by that treaty. The other part of the reservation consisted of lands which the Chippewa Indians had ceded to the United States by treaty made October 4, 1842.<sup>4</sup> Secondly, the 1848 treaty ceded all Menominee lands in Wisconsin to the United States, and the 1854 treaty did not abrogate this cession, but made an entirely

<sup>4</sup> This is apparent by comparing Maps "Wisconsin 1" and "Wisconsin 2" of Royce referred to in footnotes 1 and 3, and by referring to pages 776-777 of the text. The lands ceded by the Chippewas in 1842 is represented on Map "Wisconsin 1" by the tract bearing the numeral 261.

new cession of the twelve townships to the Menominees. This is so even though the 1854 treaty stated that it was "supplementary and amendatory" to the 1848 treaty.

Therefore, if the Menominees, prior to the effective date of the Termination Act, had exclusive hunting rights over the lands embraced in their reservation free from the state's game laws, such rights must be grounded on the 1854 treaty provision whereby such lands were ceded to them "*to be held as Indian Lands are held.*" On the face of it this is an ambiguous provision. One permissible interpretation would be that the Menominees would enjoy the same rights with respect to the ceded lands as Indians are entitled to with respect to lands owned and occupied by them which have never been ceded by treaty. Among such rights would be that of hunting free from the restrictions of any state game laws. The rule of construction to be followed in interpreting Indian treaties is that in case of ambiguity they are to be interpreted in favor of the Indians. This was the holding in *Winters v. United States* (1908), 207 U.S. 564, 576-577, 28 Sup. Ct. 207, 52 L. Ed. 340, wherein the court declared:

"By a rule in interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them "*to be held as Indian Lands are held.*" Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we deter-



mine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty.

This brings us to the crucial question of whether these exclusive rights to hunt free of the state's game laws were ended by the taking effect of the Termination Act. Congress has plenary power to deal with the Indians and may abrogate by statute Indian privileges and rights, including treaty rights. This principle was clearly enunciated in *Lone Wolf v. Hitchcock* (1903), 187 U.S. 553, 565-566, 23 Sup. Ct. 216, 47 L. Ed. 299, wherein the court stated:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U.S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas v. Gay*, 169 U.S. 264, 270; *Ward v. Race Horse*, 163 U.S. 504; 511; *Spalding v. Chandler*, 160 U.S. 394, 405; *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U.S. 114, 117; *The Cherokee Tobacco*, 11 Wall. 616."

For a recent federal case which acknowledges the existence of this plenary power of Congress over Indian tribes which cannot be limited by treaties, see *Anderson v. Gladden* (9th Cir. 1961), 293 Fed. (2d) 463, affirmed by memorandum decision, 368 U.S. 949, 82 Sup. Ct. 390, 7 L. Ed. (2d) 344 (1961).

Sec. 891 of the Termination Act provides that the purpose "is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." Sec. 899 of the Act provides that upon the Secretary of the Interior publishing a proclamation in the Federal Register that all tribal property has been transferred in accordance with the Act, "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

The italicized statutory language, given its plain and ordinary meaning, would subject the Menominees' pre-existing exclusive hunting rights to the state's game laws. However, defendants' counsel contends that the legislative history surrounding the enactment of the Termination Act precludes such an interpretation because it shows that this was not the intent of Congress.

The original bill, which was finally enacted by the 83rd Congress in 1954 as the Termination Act, originated in the House of Representatives as H. R. 2828. Two other companion bills to provide for the withdrawal of the Menominee Tribe from federal jurisdiction were also introduced, the one in the Senate being S. 2813, and the one in the House of Representatives being H. R. 7135. Joint hearings on all three bills were held before Subcommittee of the Committee on Interior and Insular Affairs of the Senate and the Subcommittee of the Committee on Interior and Insular Affairs of the House of Representatives on March 10th, 11th, and 12th, 1954. Both S. 2813 and H. R. 7135 contained express provisions which preserved any special hunting and fishing rights the Menominees might have by treaty, statute, custom or judicial decision. H. R. 2828 contained no such corresponding provision. At pages 587-589, the printed report of the proceedings of

this joint hearing<sup>5</sup> contains a letter dated March 5, 1954, addressed to the chairman of the House Committee on Interior and Insular Affairs by Orme Lewis, Assistant Secretary of the Interior, which explains the differences between the three bills, and mentions the difference in the treatment of hunting and fishing rights noted above. With respect to H. R. 2828 the letter states (p. 588):

"H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have. If any special hunting and fishing rights have been granted by statute, however, they will be repealed by the provision of the bill making inapplicable all statutes that apply to Indians merely because of their status as Indians."

H. Rex Sigler of the Solicitor's Office, Department of Interior, gave this testimony at the joint hearing (at page 629):

"The next difference relate to hunting and fishing rights. The earlier bill [H. R. 2828] does not say anything at all about the subject. It is silent. And by its silence it, in my judgment, makes no change in any treaty rights that may exist. However, the earlier bill will repeal any hunting and fishing rights that may have been granted by statute. I do not know of any such rights, but there is the general provision in the bill making inapplicable to these Indians Federal legislation that applies to Indians as such, which would affect any special statute that may be on the books. Again, I do not know of any such statute. It would not, however, in my judgment, affect the treaty rights, which are not specifically mentioned but are not in conflict with this particular bill.

"The later bill, however, would specifically preserve all hunting and fishing rights granted not only by

<sup>5</sup> "Joint Hearings Before the Subcommittee of the Committees on Interior and Insular Affairs, Congress of the United States, Eighty-Third Congress, Second Session on S. 2813, H. R. 2828 and H. R. 7135."

treaty but also by statute or custom or judicial decision. And to that extent, the bill would qualify the authority of the State to apply its conservation laws. So the issue, as I see it, is whether the Federal Government should specifically provide that hunting and fishing rights beyond treaty rights should be immune from State regulation."

Both the Lewis letter and the Sigler statement are favorable to the defendants' position. This is because both take the position that H. R. 2828 would not affect fishing and hunting rights conferred by treaty while it would effect those conferred by statute. Neither, however, specifically mentions the provision of the bill now found in sec. 899 of the Termination Act that "*the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

At the joint hearing Glen A. Wilkinson, attorney for the Menominee Tribe, submitted a written statement which is printed in full in the report of this hearing. In this written statement Wilkinson commented on that part of the Lewis letter, or report, of March 5, 1954, quoted above (at page 697):

"... the statement is made that 'H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have.' Whether it 'purports' to affect such treaty rights seems immaterial; the fact is that it does, at least by implication, abolish the tribal rights to exclusive hunting and fishing privileges within the reservation—rights which were solemnly assured to the tribe in perpetuity."

Thus two conflicting interpretations of the effect of H. R. 2828 on the Menominees' fishing and hunting rights were presented at the joint hearing. Counsel for the defendants contends that the tribal representatives agreed to the interpretation of Lewis and Sigler. Wilkinson's



statement seems to refute this. We are unable to find any proof that Congress in enacting H. R. 2828, without any express reference to hunting and fishing rights, intended to agree with the interpretation of Lewis and Sigler. An equally tenable inference is that Congress, in enacting the Termination Act which ended the status of the Menominees as wards of the United States, intended that whatever exclusive hunting and fishing rights the Indians possessed on their tribal lands should be subject to the same state conservation laws as are the hunting and fishing rights of any other landowners.

In considering the instant problem of interpretation we consider pertinent the preamble of House Concurrent Resolution 108, 83rd Congress, 1st Session, pursuant to which resolution H. R. 2828 was drafted and introduced:

"Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

"Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens:"<sup>6</sup>

It is our conclusion that the express provision of sec. 899 of the Termination Act that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction," includes the state conservation laws applicable to hunting. To this extent the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former

<sup>6</sup> This resolution is set forth in full at page III of the report of the joint hearing referred to in footnote 5.



tribal lands of the reservation. Whether the Menominees by reason of treaty still enjoy any special hunting rights over their former reservation lands, other than that of being free of such game laws, which were not abrogated by the Termination Act, we do not here decide.

*By the Court.*—Judgments reversed and causes remanded for further proceedings not inconsistent with this opinion.

\* \* \*

DIETRICH, J. (dissenting). I cannot agree with the majority decision that the Termination Act abrogates the rights of the Menominee Indians to exercise their hunting and fishing rights free from the state's game laws. The majority concedes that under the 1848 and 1854 treaties the hunting and fishing rights of the Menominee Indians were held free from state game law restrictions. The Termination Act of 1961, contains no reference to the subject, and does not purport to affect any treaty rights the Indians may have. The Termination Act is based on the assumption that during the years of government supervision of Indian affairs, the government has so advanced and prepared the Indians for modern living, that they have become self-sufficient. The amount of fiscal aid provided the Menominees in the short period since the enactment of the Termination Act is by itself sufficient to show the unsoundness of this assertion. While hunting and fishing is not in itself a sufficient supplement to the modern way of life, it does help. The rights of the Menominee Indian to hunt and fish on tribal lands far outweighs any need of the state of Wisconsin or any of its agencies to invade these rights. This is especially so in that these rights were reserved to the Menominees under the treaties of 1848 and 1854.

An examination of the record discloses that the deed of forest lands from the United States to Menominee Enterprises, Inc., dated April 26, 1961, contains a provi-

sion prohibiting transfer of ownership of the lands for a period of thirty years without prior consent of the state conservation commission and approval of the Governor. The conveyances from Menominee Enterprises to the individual Menominee Indian landholders give Menominee Enterprises an option to repurchase the lands in the event that the grantees decide to sell. In other words, Menominee Enterprises exercises complete control over the lands. It should also be noted that the Termination Act provides a way of life for the Indians by a provision that the timberland be operated on a sustained yield basis. Their other way of life, namely by hunting and fishing, is not referred to at all. The conveyances give Menominee Enterprises complete control over transfer of the lands, and the sustained yield provisions of the Termination Act control the use of the lands. How, then, can this court say that the Indians have been given the same rights as other citizens of Wisconsin, when control over any transfer of their lands is to be held in trust for a period of thirty years, and when the use to which the Menominees may put these lands is closely regulated by the provisions of the Termination Act, and the Menominee Indians Assistant Trust. In effect, the Menominee Indians have not received full status as citizens, and under the facts of the instant case, retain their inherent tribal hunting and fishing rights, which were assured to them in perpetuity under the terms of the treaties of 1848 and 1854. I would affirm the judgment of the trial court.

## APPENDIX F

IN THE DISTRICT COURT OF THE STATE OF  
OREGON FOR THE COUNTY OF KLAMATH

No. 61-792 C

THE STATE OF OREGON,

*Plaintiff,*

vs.

HARRY PEARSON,

*Defendant.*

## MEMORANDUM OPINION AND ORDER

There was, on the 22nd day of November, 1961, a complaint filed wherein The State of Oregon was Plaintiff v. Harry Pearson, a member of the Klamath Tribe of Indians, Defendant. The State alleged in their complaint that Harry Pearson, a member of the Klamath Indian tribe, is accused of the crime of illegal possession of deer meat in that he wilfully and unlawfully, in the County of Klamath, State of Oregon, within the area formerly known as the Klamath Indian Reservation, have in his possession a certain deer carcass \* \* \*, said defendant not then and there having secured and having in his possession a deer tag.

This was demurred to on the grounds that the complaint does not state facts sufficient to constitute a crime and that this Court does not have jurisdiction over the offense and crime as alleged in the complaint. In support of this demurrer, the defendant through counsel O'Neill & McLaren, filed briefs to which the State of Oregon answered by brief. The question was whether the individual Indians who were members of the Klamath and Modoc tribes and Yahooskin Band of Snake Indians, hereinafter referred to as the Klamath Indians, retain

the right to hunt subsequent to the Klamath Termination Act as amended. (Title 25 U.S.C.A. 564)

## OPINION

In aboriginal times up to the coming of the white man and through the period of recorded history, the Indians known as Klamath and Modoc Tribes and the Yahooskin Band of Snakes, as individuals possessed, according to their culture, a large portion of the states of Oregon and California and the right to hunt without restriction or control except that imposed by themselves was included in such possessions, according to their culture. The right to hunt was a substantial portion of their subsistence, and inured to succeeding generations up to and including the period following the treaty of 1864 and was practiced by members of the reservation up to the present time.

To understand the rights of the Klamath Indians with regard to hunting, it is necessary to examine briefly the legislative history of various treaties and acts affecting them. Federal District Judge Gus Solomon decided in the case of Klamath & Modoc Tribes and Yahooskin Band of Snake Indians of the Klamath Reservation in The State of Oregon, et al., Plaintiffs, v. H. G. Maison, Superintendent of the Department of State Police, State of Oregon, et al, [139 F. Supp. 634 (D. Ore. 1956)] that the members of said tribes "have a right, privilege or immunity pursuant to federal treaty, agreement or statute, and specifically pursuant to the Treaty with the United States of America of October 14, 1864, 16 Stat. 707, to hunt and trap upon the Klamath Indian Reservation without restrictions or control by the State of Oregon; and that Public Law 280, 83rd Congress Act of August 15, 1953, 67 Stat. 588, 18 U.S.C.; Title 1162, 28 U.S.C.; Title 1360, did not extend the hunting or trapping laws of the State of Oregon to the Klamath Reservation."

The significance of this decision, in the opinion of the Court, inasmuch as the treaty of 1864 did not mention hunting or trapping, is that the Indians possessed the right in the absence of a grant away and the Court so held in the above-mentioned case.

The subcommittee of the House saw fit to amend Public Law 280 in the portion of the amended bill dealing with criminal jurisdiction, sec. 2, subsection b, and recognized specifically the right of any Indian, with regard to Public Law 280, to hunt and trap.

The Supreme Court of the State of Wisconsin in a case involving the Chippewas cited as *State v. Johnson*, 212 Wis. 301; 249 N. W. 285, held as follows:

"While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they theretofore enjoyed we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to the lands reserved to them at the time the treaty of 1854 was entered into and was not a shadow of impediment upon the hunting rights of the Indians on the lands retained by them. *The treaty was not a grant of rights to the Indians but a grant of rights from them*, a reservation of those not granted. (*U.S. v. Winans* 198 U.S. 371, 25 S. Ct. 662, 664; 49 L.Ed. 1089) We entertained no doubt the right of Indians to hunt and fish upon their lands continued." (emphasis added)

The case of *United States v. Winans* and the above-mentioned case both sustained the theory which this Court adopts that right or duties imposed on the Indians herein were not grants of them but from them to the government; therefore, what they have not granted away they still possess and any substantial right or possession, such as hunting, cannot be taken away by implication. Since the Klamath Termination Act as amended did not



specifically provide for a grant away of the hunting and trapping rights with due and proper consideration therefor, it is the conclusion of this Court that they are still retained by the enrolled members only and they can exercise their heritage to hunt and trap within the areas of the former existing Klamath reservation without restriction by the State of Oregon. This Court does not decide any question with relation to privately held lands within the former reservation area as that question is not now before this Court.

### ORDER

It is the order of this Court that the demurrer filed by the defendant, Harry Pearson, be sustained;

That the enrolled members only of the Klamath Tribe of Indians shall have a right to hunt and trap within the areas in the formerly existing Klamath reservation without restriction by the State of Oregon.

Dated this 30th day of November, 1961, at Klamath Falls, Oregon.

/s/ Hal F. Coe  
District Judge

## APPENDIX G

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

Civil No. 8081

KLAMATH & MODOC TRIBES [ET AL.],  
*Plaintiffs,*

v.

H. G. MAISON [ET AL.],  
*Defendants,*

and

UNITED STATES OF AMERICA,  
*Intervenor.*

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

\* \* \*

## CONCLUSIONS OF LAW

1. The Court has retained jurisdiction over this case pursuant to its previous judgment entered March 13, 1956, and the Court has jurisdiction to consider the petition for relief pursuant to 28 U.S.C. § 2202. The Court specifically determines that the provisions of § 2281 of Title 28, U.S.C., requiring a three-judge court are not applicable.

2. The Klamath and Modoc Tribes and Yahooskin Band of Snake Indians continue to constitute a Tribe whose membership is composed of remaining members whose names appear on the official roll of remaining members of the Klamath Tribe, as certified under date of March 3, 1959.

3. Said Tribe continues to hold the beneficial and equitable interest in certain real property, more specifically described in the Court's judgment herein, title to

which was conveyed by the United States of America, Department of the Interior, on March 3, 1959, and on May 6, 1959, by deeds to tribal property to The United States National Bank of Portland, Trustee in trust for said Tribe as defined in paragraph 2 above.

4. With respect to the lands mentioned in paragraph 3 above, the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians and the remaining enrolled members thereof have an exclusive right, privilege and immunity afforded them under the Treaty of October 14, 1864 (16 Stat. 707), between said Tribe and the United States of America, to hunt and trap upon said lands without restriction or control, except such restriction or control as they may impose upon themselves.

5. With respect to those members of the said Tribe who elected to withdraw from the Tribe, to the extent that those members may not have received "the money value of their interests in tribal property," and therefore continue to be members of the Tribe for purposes of tribal claims against the United States (see 25 U.S.C.A. 564e(c) and 564t) such withdrawn members have no rights, privileges or immunities to hunt and trap upon the lands referred to in paragraph 3 above.

6. The lands comprising the remainder of the original Klamath Reservation which were purchased, sold, taken or disposed of by the United States and which, in part, later became a part of the Winema National Forest under the proclamation of the President of the United States (No. 3423, July 29, 1961, 26 F. R. 6799), and which, in part, became the Klamath Forest National Wildlife Refuge, are free and unburdened by any right of the Tribe or its remaining or withdrawing members to hunt and trap thereon pursuant to the Treaty of October 14, 1864 (16 Stat. 707) and said lands are subject to the control and regulation by defendants with respect to hunting and trapping laws of the State of Oregon.

7. It is not necessary at this time that the Court grant any injunctive relief but jurisdiction is reserved to grant such relief in an appropriate proceeding upon application by plaintiff Tribe and upon a proper showing of the necessity thereof.

Done and dated at Portland, Oregon, this 10th day of December, 1963.

/s/ Gus J. Solomon

United States District Judge





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**In the Supreme Court of the United States**

**OCTOBER TERM, 1967**

**MENOMINEE TRIBE OF INDIANS, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES**

**THURGOOD MARSHALL,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C., 20530.*

# **In the Supreme Court of the United States**

OCTOBER TERM, 1967

---

No. 187

**MENOMINEE TRIBE OF INDIANS, PETITIONER**

*v.*

**UNITED STATES OF AMERICA**

---

***ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF CLAIMS***

---

**MEMORANDUM FOR THE UNITED STATES**

---

## **STATEMENT**

By a treaty of 1854, the United States created a reservation for the Menominees, ceding to the tribe certain lands "to be held as Indian lands are held" (Pet. App. 39-40). In 1954 a "Termination Act" was enacted for the purpose of providing "for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin" (Pet. App. 41-43). In 1961, the Secretary of the Interior published a proclamation of ter-

mination which, under the Act, made State laws applicable to the Menominees "in the same manner as they apply to other citizens or persons within [the State's] jurisdiction." Thereafter, three Menominee Indians were charged with violating the State game laws, and the Supreme Court of Wisconsin held that, as a result of the Termination Act, the Indians were subject to such laws. *State v. Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41 (Pet. App. 58-69). When a petition for a writ of certiorari was filed, this Court requested the views of the Solicitor General (377 U.S. 920). In response, we stated our view that the result reached by the Wisconsin Supreme Court was correct. See Memorandum for the United States as Amicus Curiae in No. 93<sup>0</sup> October Term, 1963. While conceding that the decision of the Wisconsin Supreme Court would have a substantial economic impact on the members of the Menominee tribe, we expressed doubt as to how far the question would become the subject of future litigation. Certiorari was denied (377 U.S. 991).

Subsequently, the "Menominee Tribe of Indians" brought the instant litigation in the Court of Claims to recover compensation for the alleged taking of their right to hunt and fish free of State regulation. The majority of the Court of Claims concluded that the Termination Act had not abrogated the Tribe's hunting and fishing rights, and dismissed the complaint on the ground that the only interferences with the right to hunt and fish free of State regulation was by the State of Wisconsin, acting through its

Supreme Court and its law enforcement officers, not by the United States (Pet. App. 13-34, at 32). The majority suggested that a remedy might be available to the plaintiffs under the approach followed in *Moore v. United States*, 157 F. 2d 760 (C.A. 9).<sup>1</sup> Three judges dissented, expressing the view that the issue should be certified to this Court (Pet. App. 34-38).

### DISCUSSION

1. It is not clear whether the Treaty of 1854 granted to the Menominee Indians, as a proprietary interest, any special right to hunt and fish on their lands free of State regulation.<sup>2</sup> To be sure, so long as the reservation remained under exclusive federal jurisdiction, State game laws would not apply. But it does not follow that this immunity was a property right that would survive the termination of federal supervision and of the Tribe's quasi-sovereignty over the territory. Indeed, the treaty does not expressly advert to hunting and fishing rights. On the other hand, as the Court of Claims emphasizes (Pet. 18-19), the lands selected for the reservation were chosen primarily because of the abundance of game—hunting

---

<sup>1</sup> That was a suit brought by the United States in its representative capacity to enjoin application of State game laws within the Quillayute Indian Reservation where there had been no termination of federal functions. Injunctive relief was obtained.

<sup>2</sup> Our memorandum in *Sanapaw* denied the grant of any such special rights. On reconsideration, however, we now view the question as less clear.



and fishing being an indispensable aspect of the Menominee way of life—and it may be that the absence of an express grant is not critical. At all events, however, we believe that any special right the Menominees may still enjoy to hunt and fish on their lands must yield to the extent reasonably necessary to promote the State's conservation and other related policies. Cf. *Tulee v. Washington*, 315 U.S. 681. Applying this standard, the result reached by the Wisconsin Supreme Court in *Sanapaw* seems correct on the facts of that case, because the regulations actually applied—prohibitions against hunting deer with the aid of an artificial light and transporting a loaded and uncased gun in an automobile—appear to be reasonably necessary conservation or safety measures.

2. Also difficult is the question whether a special tribal right to hunt and fish, if any, would persist after closing of the tribal roll, the distribution of the tribal property to the enrolled members and the end of tribal self-government—all apparently contemplated by the Menominee Termination Act. See 25 U.S.C. 893, 896, 897. That such a result is permissible is indicated by the otherwise similar Termination Act for the Klamath Tribe, which expressly provides that termination of federal supervision “shall [not] abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.” 25 U.S.C. 564m(b). The absence of such a saving provision here may not be dispositive (see the conflicting views expressed in the congressional committee hearings, recited in the opinion of the



Wisconsin Supreme Court (Pet. 64-67)). Perhaps, in the case of the Menominees, the presently enrolled members alone would enjoy any proprietary tribal rights.

But, however that matter is resolved, it seems plain the United States cannot be held accountable in the present suit. Indeed—assuming the existence of special hunting and fishing rights—if those rights are now lost to the Menominees, it is not because the Treaty of 1854 has been repudiated, but, rather, as a mere consequence of the fact that the Tribe, the grantee, has ceased to exist. On the other hand, if the Tribe is viewed as continuing, or the tribal rights are deemed to have passed to the members, no taking has occurred. Accordingly, we believe the judgment of the Court of Claims is correct.

3. Although we believe that both the Wisconsin Supreme Court and the Court of Claims reached correct results, we recognize that the two courts are in fundamental disagreement as to the present status of the fishing and hunting rights of the Menominees, and, further, that both courts apparently reject our conclusion that no absolute immunity from State regulation was conferred on the Tribe, as a property right, by the Treaty of 1854. This Court is the obvious forum to resolve the existing conflict and uncertainty.<sup>3</sup> The question raised is an important

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<sup>3</sup> The suggested suit in a federal district court for injunctive relief would encounter practical and policy obstacles. Granting such an injunction would fly squarely in the face of the Wisconsin Supreme Court's decision in *Sanapaw*. Moreover, it is doubtful whether the United States could initiate

one involving the proper construction of treaty and statutory provisions. Since termination of federal supervision over Indian tribes is a continuing policy of the federal government and since other termination statutes containing similar provisions have been enacted in recent years, resolution by this Court of the issues here presented may have a reach beyond the instant controversy. We, therefore, do not oppose the granting of the petition.

Respectfully submitted.

THURGOOD MARSHALL,  
*Solicitor General.*

AUGUST 1967.

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such a suit since the termination of federal supervision over the property and members of the Tribe would seem also to terminate its capacity to bring suit on their behalf.

AUG 10 1967

JOHN F. DAVIS, CLERK

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1967

---

No. 187

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MENOMINEE TRIBE OF INDIANS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

---

REPLY TO THE GOVERNMENT'S MEMORANDUM

---

The Government says "on reconsideration, however, we now view the question as less clear."<sup>1</sup> We suppose this is the closest the Government is likely to come to admitting that it made an unfortunate mistake the last time this case was offered to this Court. The last time, the Court will recall, the Government took the position that the Tribe had only the hunting and fishing rights that any landowner has.<sup>2</sup> It is too bad the Government had not discovered its doubt by then; perhaps then the Tribe would have been spared the substantial additional expenses it incurred (and paid) in litigating the question of compensation before the Court of Claims.

The Government several times refers to the "majority" of the Court of Claims. We would remind this Court

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<sup>1</sup> Govt. Memo. p. 3 n.2.

<sup>2</sup> Govt. Memo., *Sanapaw v. Wisconsin*, No. 930 O.T. 1963.

that even the minority favored the Tribe; it agreed that the Indians either owned the rights or should be paid for their loss.<sup>3</sup> Indeed, that is exactly our position; although the Tribe as a matter of policy would prefer to have its hunting and fishing rights, rather than compensation, its position at this stage of the litigation is merely to ask this Court to decide the matter one way or the other.

The Government,<sup>4</sup> now conceding the Tribe may have hunting and fishing rights after all, believes that any such rights would be subject to "reasonably necessary" State conservation laws, citing *Tulee v. Washington*, 315 U.S. 681 (1942).<sup>5</sup> Therefore, reasons the Government, the Wisconsin Court reached the right result because the game regulations before it "appear to be reasonably necessary conservation or safety measures."

Bypassing the relevance of "safety" considerations, we can hardly agree with the Government's glib characterization of hunting with an artificial light (i.e., jacklighting) as a "reasonably necessary" conservation rule. In an ordinary context, of course, it probably is a reasonably necessary conservation rule. But we are not defining "necessary" in an ordinary context; we are defining the word in the context of an Indian treaty, where there are very strong opposing policy factors. As used in *Tulee*, the word meant, we think, "so necessary that Indian treaty rights should give way to it." In that sense, it cannot tenably be argued that enforcement of the jacklighting rule is so important that an Indian treaty right to hunt in a certain area should yield to it (at least not without a showing that the game is in

<sup>3</sup> Dissent, reprinted in the Appendix of our main brief herein at p. 38.

<sup>4</sup> Govt. Memo. p. 4.

<sup>5</sup> Actually, *Tulee* says "necessary", not "reasonably necessary" 315 U.S. at 684.

imminent danger of extinction due to Indian jacklighting, and that such extinction would affect public hunting rights outside the reservation). If the jacklighting rule deserves such importance, then *all* state conservation rules are "necessary", and the Indians' rights are totally meaningless.

Although the Government does not mention it, and although this is a point better reserved for argument on the merits, we are obliged to point out that the meaning of *Tulee's* "necessary" has been the subject of a substantial body of conflicting jurisprudence. See, for example, the following cases, which dealt with treaty hunting and fishing rights outside Indian reservations:

- a. *Makah Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951) (state has burden to prove its conservation rule is "necessary.")
- b. *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert.den. 347 U.S. 937 (state cannot enforce any conservation rules at all against Indians with treaty rights).
- c. *Maison v. Confederated Tribes*, 314 F. 2d 169 (9th Cir. 1963), cert.den. 375 U. S. 829 (state can restrict Indians only if adequate conservation cannot be achieved by restriction of whites).
- d. *Confederated Tribes v. Maison*, 262 F.Supp. 871 (D.Ore. 1966) (if state wants to reduce deer and elk kill, it should issue fewer licenses to sportsmen).
- e. *Dept. of Game v. Puyallup Tribe*, — Wash. 2d —, 422 P.2d 754 (1967) (disagrees with *Maison v. Confederated Tribes*, above, and would make the state's burden much easier.)



Perhaps this case is a propitious vehicle to resolve some of the conflicts which have arisen over the interpretation of *Tulee*, but until these conflicts are resolved, it is certainly conjectural on the Government's part to suggest what conservation rules may be "necessary" under the *Tulee* standard.

Respectfully submitted,

---

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

On Writ of Certiorari to  
the United States Court of Claims

**BRIEF FOR PETITIONER**

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IN THE  
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No. 187

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UNITED STATES OF AMERICA,  
*Respondent.*

---

**On Writ of Certiorari to  
the United States Court of Claims**

---

**BRIEF FOR PETITIONER**

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**OPINION BELOW**

The opinion of the Court of Claims is reprinted in the Appendix, pp. 5-26. It has not yet been reported in the Court of Claims reports, and apparently has not been selected for publication in the Federal reports. Two other decisions deal with this case, and they are reprinted in the Appendix, pp. 36 and 51. One is *State v. Sanapaw*, Shawano-Menominee County Court (1962) (unreported), and the other is same, Wisconsin Supreme Court, 21 Wis. 2d 377, 124 N.W.2d 41 (1963), *cert. den.* 377 U.S. 991, *reh. den.* 379 U.S. 871 (No. 930.O.T. 1963).

## JURISDICTION

The judgment of the Court of Claims was entered April 14, 1967. The petition for certiorari was filed May 22, 1967, and was granted on October 9, 1967. Jurisdiction is invoked under 28 U.S.C. § 1255 (1).

## TREATIES AND STATUTES INVOLVED

Treaty of May 12, 1854, 10 Stat. 1064, between the Menominee Tribe of Indians and the United States, Appendix pp. 31-32, and Menominee Termination Act of 1954, 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902, as made effective by Proclamation of the Secretary of Interior, April 29, 1961, 26 Fed.Reg. 3726, Appendix pp. 33-35.

## QUESTION PRESENTED

Since aboriginal times the Menominee Indians have hunted and fished on their own land, free of state or federal regulation. This freedom was guaranteed by treaty in 1854. In 1954, Congress enacted the Menominee Termination Act, to terminate federal supervision and transfer general jurisdiction over the reservation to the State. Nothing was said in the Act about hunting and fishing rights. The question is whether this Act by implication abrogated the Indians' treaty hunting and fishing rights, by making them subject to state regulation.

## STATEMENT

### Introductory Statement

Prior to April 30, 1961, the Menominee Tribe of Indians of Wisconsin were under federal guardianship. They were provided certain benefits and services by the federal government, and were subject only to their own tribal laws and to such laws as Congress enacted appli-



cable to Indian reservations generally or to their reservation particularly. After April 30, 1961, federal guardianship was terminated, pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902. The Menominee Reservation became a county under the organic laws of the State of Wisconsin, and the Menominees became subject to the general laws of the State of Wisconsin.

Their title to their reservation derives from the Treaty of Wolf River (1854), 10 Stat. 1064, which confirmed their ownership of the land, and guaranteed them the right to hunt and fish on their land free of outside restrictions. This guarantee does not appear in so many words on the face of the Treaty, but as will be seen was imported into the Treaty by the surrounding circumstances.

After federal supervision was terminated, the State of Wisconsin took the position that the Indians' treaty rights to hunt and fish likewise were terminated. The State prosecuted several Menominees for violation of State game regulations. Although the trial judge ruled in the Indians' favor, the Wisconsin Supreme Court (by a two-to-one vote) reversed, holding that the Termination Act "abrogated" their treaty right to hunt and fish. This Court declined to review the case. These two decisions are reprinted in the Appendix, pp. 30 and 51.

Since this appeared to constitute a final determination that the Menominee hunting and fishing rights were lost, the Tribe filed suit in the Court of Claims seeking compensation for the loss. See petition, Appendix p. 1. That court refused to award compensation, on the ground that the hunting and fishing rights were *not* lost, but were still in force.

Thus the case came here.

The Tribe is in the anomalous position of petitioning this Court to *affirm* the Court of Claims below. The Tribe's hunting and fishing rights are more valuable to its members than would be any monetary compensation likely to be awarded, and so it would rather the Court of Claims be held correct than the Wisconsin Supreme Court.

We note that the State of Wisconsin intends to file a brief *amicus curiae*, "in support of the plaintiffs, the Menominee Tribe . . ." We assume the State means it will support the legal position that the Tribe necessarily had when it filed suit in the Court of Claims, i.e., that the Tribe had lost its rights. As stated above, the Tribe's position is that it still has its rights. The following sections give the facts of the case in detail.

#### Origin of the Hunting and Fishing Rights

Since time immemorial the Menominee Indians have lived as a tribe in the forests of Eastern Wisconsin. They constitute today a tribe of some 3,270 enrolled members.

By way of historical background, it may be noted that by the Treaty of St. Louis, 7 Stat. 153 (1817), the Menominee Indians acknowledged themselves to be under the protection of the United States, and the parties agreed there would be perpetual peace and friendship between them.<sup>1</sup> The Treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundaries of the Menominees' territory. By the Treaty of Washington, 7 Stat. 342 (1831), as amended, 7 Stat. 405 (1832), they ceded some 3,000,000 acres of their aboriginal territory, and expressed a desire to remain under the "parental care and protection" of the

<sup>1</sup> The facts in this and the following paragraphs are based on the citations given and on the Court of Claims' findings, Appendix pp. 5-26.

United States. By the Treaty of Cedar Point, 7 Stat. 506 (1836), they ceded approximately 4,184,000 more acres.

By the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952 (1848), the Menominees ceded the balance of their lands in Wisconsin (estimated to contain about 4,000,000 acres),<sup>2</sup> in exchange for at least 600,000 acres west of the Mississippi. To give them time to explore their new lands, the Indians were to be permitted to remain on their ceded lands for two years, and thereafter until the President should notify them that the same were wanted.<sup>3</sup>

An exploration party of Menominees inspected the new lands, but reported that the lands were not suitable to the Tribe's needs. The Menominees refused to move to the new lands. They claimed that the understanding in 1848 had been that if the new lands were not acceptable they would be offered acceptable lands elsewhere.<sup>4</sup>

The Government extended the deadline for leaving, and suggested that they remove instead to a certain tract on Wolf River in Wisconsin, a little north of their then camping grounds. The proposed tract contained twelve townships, or 276,480 acres. The Menominees agreed and removed thither in the fall of 1852.<sup>5</sup>

The Government sought the permission of the State to the setting aside of the Wolf River reservation for the

<sup>2</sup> Annual Report of the Commissioner of Indian Affairs, 1848, Ex. Doc. 1, 30th Cong., 2d Sess., p. 397-8.

<sup>3</sup> Article 8.

<sup>4</sup> Annual Report of the Commissioner of Indian Affairs, 1851, H.R. Ex. Doc. 2, Part III, 32d Cong., 1st Sess., pp. 266-67, 293. See also recitations in the Treaty of Wolf River, 10 Stat. 1064 (1854), Appendix p. 31.

<sup>5</sup> Annual Report of the Commissioner of Indian Affairs, 1852, Sen. Doc. 1, 32d Cong., 2d Sess., pp. 295, 325. Congress appropriated \$25,000 in 1852 to enable the Indians to move to the Wolf River Reservation. 10 Stat. 47.

Menominees, and on February 1, 1853, by joint resolution, the two houses of the Wisconsin legislature consented.<sup>6</sup>

We come now to the treaty involved in this case. In order to confirm the events of 1848-1853, the Tribe and the United States entered into the Treaty of Wolf River, 10 Stat. 1064 (1854), whereby the Menominees retroceded the undesirable lands they had acquired under the 1848 treaty, and the United States confirmed to them the substitute Wolf River Reservation, "for a home, to be held as Indian lands are held . . . ." Nothing was expressly said of hunting rights, but as the Court of Claims found on the evidence in another case,<sup>7</sup>

"The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game.

". . . part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty, was the fact that the tract in question contained swamp lands which were suitable for hunting."

In 1858 the Menominees ceded two of their twelve townships to the United States, for use of certain New

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<sup>6</sup> 1853 Wis.Jt.Res., Chap. I, which states: "Resolved by the Senate and Assembly of the State of Wisconsin, That the assent of the State of Wisconsin is hereby given to the Menominee nation of Indians, to remain on the tract of land set apart for them by the President of the United States on the Wolf and Oconto rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows . . . ."

<sup>7</sup> *Menominee Tribe v. United States*, 95 Ct.Cl. 232, 240, 241 (1942). See also the Menominees' Treaty of 1831, 7 Stat. 342, Article Sixth, which reserved hunting and fishing rights on ceded land.

York Indians, 11 Stat. 679. The remainder, comprising about 230,000 acres, has remained their reservation to the present day. It has never been allotted, and with minor exceptions (such as public roads), remains today as in 1854 an intact tract of land, wholly owned by the Tribe.<sup>8</sup>

### The Termination Act of 1954

In 1954, Congress enacted the Menominee Termination Act.<sup>9</sup> The purpose of the Act was "to provide for the orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."<sup>10</sup>

A comprehensive program was authorized to implement the Act and to insure that the transition was not detrimental to the Tribe. The Tribe was to propose a plan for administration of tribal property and affairs. It was contemplated that the Tribe would incorporate, the members would be stockholders, and the stockholders' powers would be exercised by a group of voting trustees. The Secretary of the Interior was authorized to transfer to the tribal corporation, on or before April 30, 1961, all tribal property held in trust by the United States.<sup>11</sup>

The Act provided that upon transfer of the property to the Tribe, the Secretary was to publish a proclamation of that fact and—<sup>12</sup>

"... the laws of the several States shall apply to the tribe and its members in the same manner as

<sup>8</sup> The technical form of ownership since 1961 has been that the land is owned by the tribal corporation, and the Indians are the sole shareholders.

<sup>9</sup> 68 Stat. 250, 25 U.S.C. §§ 891-902, Appendix pp. 33-35.

<sup>10</sup> 25 U.S.C. § 891.

<sup>11</sup> 25 U.S.C. §§ 896, 897.

<sup>12</sup> 25 U.S.C. § 899.



they apply to other citizens or persons within their jurisdiction."

The Act was silent about preservation of hunting and fishing rights, although it did require that the Tribe's plan contain provisions for the protection of its fish and wildlife.<sup>13</sup>

The legislative history is of little help in determining whether Congress intended to destroy the Tribe's hunting and fishing rights, or whether Congress even considered the problem, although the problem was called to its attention, see discussion at pp. 22-23 below.

Pursuant to the Act, the Secretary's proclamation of termination was published on April 29, 1961, and the reservation was conveyed intact to the new tribal corporation.<sup>14</sup>

The story of what has happened to the Menominees since termination cannot be told here; suffice it to say that in 1966 a committee of Congress characterized them as "in desperate straits."<sup>15</sup> The hunting and fishing rights are more important to these Indians than ever.

### History of Litigation

This suit has a rather long history of litigation. In 1962, the year following the Secretary's proclamation, the State took the position that the Menominees were fully

<sup>13</sup> 25 U.S.C. § 896.

<sup>14</sup> The proclamation appears at 26 Fed. Reg. 3726.

<sup>15</sup> H.Rept. 1924, 89th Cong. 2d Sess. (1966) at p. 2. The Termination Act was forced on the Menominees as a condition to releasing to them a large sum of money they had won in a suit against the United States. This and the ensuing suffering of these Indians are definitively documented by Gary A. Orfield, *A Study of Indian Termination Policy* (Master's thesis for the University of Chicago), published in 1966 by the National Congress of American Indians, Washington, D.C. See also remarks of Senator Proxmire, 111 Cong. Rec. 5922-5923 (1965), and Ridgeway, *The Lost Indians*, *The New Republic*, December 4, 1965. And see the Wisconsin trial court's comment, note 42 below.

subject to State hunting and fishing regulations.<sup>16</sup> It prosecuted three Menominee Indians for unlawfully hunting deer on the reservation with the aid of an artificial light and for unlawfully transporting a loaded and uncased gun in an automobile. The Indians argued that the 1854 treaty guaranteed the right to hunt on their reservation free of the white man's hunting rules, and that the Termination Act, being silent on the matter, did not abrogate these rights. The trial court agreed, and dismissed the prosecution.<sup>17</sup>

The State appealed to the Wisconsin Supreme Court, which reversed, in a two-to-one decision.<sup>18</sup> All three judges agreed with the trial court that the tribe had special hunting rights under the 1854 treaty, but the majority held that the Termination Act abrogated those rights.<sup>19</sup>

"It is our conclusion that the express provision of Sec. 899 of the Termination Act that 'the laws of

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<sup>16</sup> A small sample of state hunting restrictions includes the following:

Hunting licenses are required, with fees ranging from \$2 to \$10. 4 West's Wisc. Stat. Ann. §§ 29.10, 29.105, 29.13, 29.132, 29.371. A "sportsman's" license can be bought for \$6.50. Id. § 29.147.

Certain game can never be taken: for example quail, prairie chicken, turkey, mourning doves, plovers, badger, woodchuck, moose, elk, flying squirrel, white deer. Wisc. Admin. Code § WCD 10.01(2) (e), 10.03.

Permitted game may be taken only during certain seasons, and subject to daily bag limits. For example, partridges, up to three per day, may be taken between Oct. 19 and Nov. 24 only. Id. § WCD 10.01(2)(d). Squirrels, up to five per day, may be taken between Sept. 28 and Jan. 31. Id. § WCD 10.01(3)(a). Deer, one a day only, may be taken between Oct. 15 and Dec. 1. Id. § WCD 10.01(3)(e).

Prohibited methods includes, for example, night hunting, § WCD 10.06; use of nets or snares, § WCD 10.07(2); shooting birds with rifles, § WCD 10.07(5); hunting deer or bear in water, § WCD 10.10(2); use of bows of less than 30 lbs. pull, § WCD 10.11; hunting from a motorboat, § WCD 10.12(1)(a); tending traps at night, § WCD 10.13(3).

<sup>17</sup> The trial court's opinion in that case is reprinted in the Appendix, p. 36.

<sup>18</sup> Reprinted in the Appendix, p. 51.

<sup>19</sup> Appendix pp. 60-61.

the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction,' includes the state conservation laws applicable to hunting. To this extent the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation."

This Court refused to review that decision.<sup>20</sup>

On September 30, 1965, the Tribe filed a claim in the Court of Claims below, to recover just compensation for the loss of its hunting and fishing rights. On April 14, 1967, the Court by a vote of four-to-three dismissed the petition.<sup>21</sup> The majority, like the two Wisconsin courts, held that the Tribe had hunting and fishing rights under the Treaty of 1854, but contrary to the majority of the Wisconsin Supreme Court, held that these rights were *not* abrogated by the Termination Act of 1954. Accordingly, said the Court, the Tribe still owns the rights, and is not entitled to compensation.

The dissenters felt that the Indians should not be left in such a dilemma, and suggested as possible solutions (1) that this Court grant certiorari, or (2) that the Court of Claims accept the Wisconsin court's ruling in a spirit of comity (with final resolution left to "a higher court", i.e. this Court), or (3) that the question be certified to this Court under 28 U.S.C. § 1255(2). As to the merits, the dissenters favored the Tribe:

"The Menominees are either entitled to their hunting and fishing rights under the Treaty or they are entitled to damages because these rights have been taken away . . . ."

On October 9, 1967, this Court granted certiorari.

<sup>20</sup> *Cert. den.*, 377 U.S. 991, *reh. den.* 379 U.S. 871; No. 930 O.T. 1963.

<sup>21</sup> Appendix p. 5.

## SUMMARY OF ARGUMENT

## I.

Indian hunting and fishing customs have a special status which has frequently been recognized by Congress, either in general statutes or as part of a bargain with a particular group of Indians. When so recognized, the customs assume the dignity of vested rights owned by the Indians. The essence of such rights, unless Congress guaranteed less, is the freedom from interference by white landowners and from regulation by white governments. In this case the right consists solely of the latter freedom, since the Indians already own the land where they wish to hunt and fish.

## II.

The 1854 Treaty with the Menominees guaranteed the continuation of the Menominees' custom to hunt and fish free of state and federal regulation. This guarantee does not appear in so many words on the face of the Treaty, but was imported into the Treaty by the surrounding circumstances and by the language, "to be held as Indian lands are held." Three courts—the Shawano-Menominee County Court, the Supreme Court of Wisconsin, and the U. S. Court of Claims below have so found. Two trial courts in Oregon—one state and the other federal—have so found in principle as to the Klamath Indians under indistinguishable circumstances.

## III.

The Menominee Termination Act did not abrogate the Tribe's hunting and fishing rights. The purpose of the Act was to terminate federal supervision, not to extinguish treaty rights. Another purpose of the Act was to transfer to the State general criminal and civil jurisdiction over the reservation, but this purpose did not by

implication require extinguishing the Indians' hunting and fishing rights by subjecting them to state regulation, and in any event the transfer of jurisdiction had already been effected under another statute, Public Law 280, which expressly preserved the Indians' hunting and fishing rights.

#### IV.

If, contrary to our assertion and the decision of the Court of Claims below, the Termination Act did extinguish the Indians' hunting and fishing rights, then the Indians are entitled to just compensation for the loss of these valuable rights.

#### ARGUMENT

##### I. It Has Traditionally Been Recognized That Indian Hunting and Fishing Customs Have a Special Status

Since earliest times the United States has recognized the special status of Indian hunting and fishing customs. One of the earliest examples was the Seneca "Contract" of 1797,<sup>22</sup> in reality a treaty,<sup>23</sup> whereby the Indians sold land, "excepting and reserving to them . . . the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."<sup>24</sup>

Even when treating with foreign countries or in enacting general statutes Congress has often demonstrated regard for the special status of Indian hunting and fishing

<sup>22</sup> 7 Stat. 601.

<sup>23</sup> It was ratified by the Senate and proclaimed by the President. See *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 561 (1916).

<sup>24</sup> For citations to other examples, see Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo.Wash.L.Rev. 504, 512-513 (1964). This article was finished and accepted for publication in June, 1963, before Mr. Hobbs was aware that his firm would be retained in the instant case. Retention was in December, 1963. The article was updated and published in April, 1964.



customs. For example, see the Migratory Bird Treaty between the United States and Great Britain, which lays down certain restrictions, but makes certain exceptions for Indians hunting for their own use.<sup>25</sup> See also the Fur Seal Agreement between the United States and Canada, and other international treaties and conventions,<sup>26</sup> and various acts of Congress.<sup>27</sup> See Public Law 280, which transferred civil and criminal jurisdiction over certain Indian reservations to the appropriate States, but expressly preserved hunting and fishing rights from state regulation.<sup>28</sup> As we shall see, Public Law 280 has a special relevance to this case.

Even off-reservation rights, which this Court has said are subject to certain state regulations,<sup>29</sup> have certain exemptions from state regulation. For example, the Indians do not need to buy licenses,<sup>30</sup> and they are subject only to such fish and game regulations as the state can prove are actually "indispensable" to conservation, by which is meant that the state must first restrict white fishing and hunting, and only if that is not enough may it then restrict Indian fishing or hunting.<sup>31</sup>

<sup>25</sup> Art. II, 39 Stat. 1702 (1916).

<sup>26</sup> Sec. 3, 58 Stat. 100 (1944). For other similar treaties and conventions, see Art. VIII, 28 Stat. 52 (1894); Sec. 1, 32 Stat. 327 (1902); Art. I, 37 Stat. 1538 (1911); Sec. 3, 37 Stat. 499 (1912).

<sup>27</sup> For acts of Congress restricting hunting or fishing but making an exception for Indians hunting for their own use, see Sec. 1, 16 Stat. 180 (1870); Sec. 6, 30 Stat. 226 (1897); Sec. 177, 30 Stat. 1253, 1280 (1899); Sec. 1, 35 Stat. 102 (1908); Sec. 6, 36 Stat. 326 (1910); and 16 U.S.C. § 631c.

<sup>28</sup> 67 Stat. 588 (1953), 18 U.S.C. § 1162.

<sup>29</sup> *Tulee v. Washington*, 315 U.S. 681 (1942).

<sup>30</sup> *Id.*; also *State v. McConville*, 65 Ida. 46, 139 P.2d 485 (1943).

<sup>31</sup> This might be called the "federal rule." It is the holding of *Makah Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951); *Maison*

[Footnote continued on page 14]

As the cases show, the Indians typically hunt and fish for subsistence, not for sport or commercial gain, and their take is usually a small fraction of that taken by white sportsmen and commercial operators.<sup>32</sup>

Indian hunting and fishing rights are superior to the hunting and fishing rights of an ordinary landowner. For example, an ordinary landowner may not exclude the public from hunting and fishing on navigable waters within his boundaries,<sup>33</sup> but an Indian tribe may do so.<sup>34</sup>

Indian hunting and fishing rights are property. This property may be conceptualized in several ways. One, and in our view a rather unhelpful concept, is in terms of

<sup>31</sup> [Continued]

v. *Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963), *cert. den.*, 375 U.S. 829, affirming 186 F. Supp. 519 (D. Ore. 1960); and *Holcomb v. Confederated Tribes v. Maison*, — F.2d —, (9th Cir., Sep. 19, 1967, not yet reported), affirming 262 F.Supp. 871 (D. Ore. 1966).

There are two other rules. The "Idaho rule" is even more favorable to the Indians—it holds that off-reservation treaty hunting rights are not subject to state regulation at all. *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953); *cert. den.*, 347 U.S. 937. Canada seems to follow the Idaho rule. *Regina v. White*, 50 D.L.R. 2d 613 (Brit. Col.Ct. App. 1964). *aff'd* 52 D.L.R. 2d 481 (Sup.Ct.Can. 1965). A third rule, the "Washington rule," is less favorable to the Indians; it holds that the Indians must obey "reasonable and necessary" fishing regulations. *Dept. of Game v. Puyallup Tribe*, 422 P.2d 754 (Wash. 1967), *cert. applied for*, No. 247, O.T. 1967.

<sup>32</sup> See, e.g., *Confederated Tribes v. Maison*, 262 F.Supp. 871, 872 (D. Ore. 1966), noting that the Indians annually took 150 to 175 elk and 300 to 350 deer, for subsistence, while sportsmen took 9,055 elk and 24,222 deer. See also *Confederated Tribes v. Maison*, 186 F.Supp. 519, 520 (D. Ore. 1960) with respect to fish. And see *Maison v. Confederated Tribes*, 314 F.2d 169, 173 (9th Cir. 1963), where an expert witness for the state admitted that "conservation" to the state meant protecting the resource for the benefit of commercial and sports fishermen, without regard to Indian welfare.

<sup>33</sup> See, e.g., *Swan Island Club Inc. v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954); *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914).

<sup>34</sup> *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); *Metlakatla Indians v. Egan*, 369 U.S. 45 (1962).

title to the fish and game within the reservation.<sup>35</sup> See, for example, *Mason v. Sams*, where the court regarded the fish in reservation waters as belonging to the tribe:<sup>36</sup>

"The state owns the fish and the game of the state, and may regulate or license the right to take them, or forbid it entirely. But the fish in the waters of this stream do not belong to the state, nor to the United States; but to the Indians of this reservation."

Another and more realistic concept is that the right consists of an immunity from outside interference. With respect to interference from private landowners, the *Winans* and *Seufert* cases<sup>37</sup> are illustrative; these cases recognized an easement on non-Indian land in favor of the Indians. They involved off-reservation rights, unlike here, where the rights claimed are entirely within the reservation.

This case involves not immunity from private landowners, but immunity from interference by outside governments, and specifically, the government of the State of Wisconsin. If these Indians' hunting and fishing rights have become subject to State regulation, they are now valueless, because the *only* valuable incident of the rights

<sup>35</sup> Under general non-Indian law it has frequently been said, see e.g., *Geer v. Connecticut*, 161 U.S. 519 (1896), that the state owns the game within its borders, in trust for its people. By analogy, the same can be said of a tribe's interest in game within the reservation. But as this Court has said, *Toomer v. Witsell*, 334 U.S. 385, 402 (1948), this concept of ownership is now regarded as a fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." See also *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950), *cert. den.*, 341 U.S. 939 (U.S. does not own the migratory waterfowl within its boundaries).

<sup>36</sup> 5 F.2d 255, 258 (W.D. Wash. 1925).

<sup>37</sup> *United States v. Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919).

is their immunity from State regulation. All other incidents are already owned by the Indians without reference to the treaty rights, because they are the landowners.

In sum, Indian hunting and fishing customs have a special status which has frequently been recognized by Congress, either in general statutes or as part of a bargain with a particular group of Indians. The essence of the right, unless Congress guaranteed less, is the freedom from interference by white landowners and from regulation by white governments. In this case the sole value of the right is the latter, since the Indians themselves own the land.

## II. The Menominee Tribe Had a Treaty Right to Hunt and Fish on Its Reservation Free of any State or Federal Restrictions

Under Article 2 of the 1854 Treaty<sup>38</sup> the United States set aside for the Menominee Tribe a certain tract of land (reservation) and agreed that it would "be held as Indian lands are held." This language, in light of the background of this Treaty and the traditions of these Indians, constitutes an implied guarantee of the Indians' right to hunt and fish. We assume it goes without saying that an implied treaty right, once proven, is no different than an express treaty right.

The Wisconsin trial court in the first proceeding found the right existed:<sup>39</sup>

"It appears to this court without even the slightest of doubt, first, that the title to the Reservation originally vested in the Indians and that the essence without even a serious doubt of the treaty entered into contemplated and intended that even if the lands were

<sup>38</sup> 10 Stat. 1064, 1065; Appendix p. 32.

<sup>39</sup> *State v. Sanapaw*, Shawano-Menominee County Court (1962), Appendix at p. 43.

granted to the government the government returned them with the incident of hunting and fishing included. Any other view of what transpired is inconsistent with all the factual bargaining and understanding between the parties. It was definitely understood that the Indians were to receive the right and title in the same absolute position as they originally held it. Their way of life, hunting, fishing and limited tilling of the soil, was the entire essence of the treaty, the government guaranteeing this."

So did the Wisconsin Supreme Court in the second proceeding:<sup>40</sup>

"It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them 'to be held as Indian lands are held.' Construing this ambiguous provision of the 1854 Treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty."

So did the Court of Claims in the third proceeding, the proceeding below:<sup>41</sup>

"The Menominees say that the language 'to be held as Indian lands are held' grants them an unqualified right to hunt and fish on the reservation in their own way free from all outside regulation or control. We think they are right, *Cf. Oneida Tribe v. United*

<sup>40</sup> *State v. Sanapaw*, 124 N.W.2d 41, 44 (1963); Appendix at pp. 55-56. See also dissenting opinion, Appendix at p. 62.

<sup>41</sup> Appendix at p. 10.



*States*, 165 Ct. Cl. 487, 490-91 (1964), *cert. denied*, 379 U.S. 946. *Moore v. United States*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827. The primary reason they accepted this reservation as their new home was that it was filled with all kinds of game. We so held in the case of *Menominee Tribe of Indians v. United States*, 95 Ct. Cl. 232, 240-41 (1941), where we said:

"The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game.  
\* \* \*

"\* \* \* part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty was the fact that the tract in question contained swamp lands which were suitable for hunting."

"It should be remembered that at the time of the treaty in 1854, hunting and fishing was a way of life with the Menominees. They depended on it for their livelihood if not their very existence."

We might add that the Menominees still do depend on hunting and fishing to supplement their diet.<sup>42</sup>

<sup>42</sup> See notes 15 and 32 above, and see the commentary of the Wisconsin trial court, Appendix pp. 47-48 (see also the dissent in the Wisconsin Supreme Court, Appendix p. 61):

"Almost any day in this court the silent tragedy continues. Young Indians, both male and female, and even the older ones with no employment supplement the modern way of life by theft and pawning. Fiscal aid by the government since termination is self-evident that the termination was premature. Hunting and fishing is not in itself a sufficient supplement to the modern way of life, but it does help.

"The right of hunting and fishing is more important and vital to the Menominee than the right of all of Wisconsin or United States citizens to invade it."

The Klamath Tribe has a treaty<sup>43</sup> which for present purposes is indistinguishable from the Menominee Treaty, and two courts have construed it the same as the three courts mentioned have construed the Menominee Treaty. The Klamath Treaty, like the Menominee Treaty, is silent on hunting rights.<sup>44</sup> Yet in 1956, the U. S. District Court for the District of Oregon held that the Klamath Treaty guaranteed the right "to hunt and trap upon the Klamath Indian Reservation without restriction or control, except such restriction or control as they may impose upon themselves."<sup>45</sup> And in 1961, the Klamath County District Court held likewise.<sup>46</sup>

The Klamath cases are unusually strong precedents because the Klamath Treaty, while silent as to *hunting* rights, expressly guaranteed *fishing* rights. Under the

<sup>43</sup> 16 Stat. 707 (1864).

<sup>44</sup> Article I expressly guarantees fishing rights, but not hunting rights. 16 Stat. at 708.

<sup>45</sup> *Klamath & Modoc Tribes v. Maison*, 139 F.Supp. 634 (D. Ore. 1956). This case was brought to determine whether the Klamaths had any hunting rights protectible under Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162. Although the Klamath Termination Act, 25 U.S.C. § 564 (1954) had been approved when that case was brought it had not yet become effective, so that state jurisdiction over the Klamath Reservation was solely pursuant to Public Law 280 at that time. Cf. discussion at pp. 24-25 below. Later, in 1963, after the Klamath Termination Act became effective, the court again considered the question, and found that the Klamaths' hunting rights were not subject to state regulation under the Termination Act either. Civil No. 8081 (unreported), referred to by the Court of Claims, Appendix pp. 19-21, and reprinted in the appendix to the petition for certiorari, p. 74. The decision was appealed to the Ninth Circuit on other grounds, and the above cited holding was not disturbed or questioned. 338 F.2d 620 (1964).

<sup>46</sup> *State v. Pearson* (unreported); referred to by the Court of Claims, Appendix pp. 19-21, and reprinted in the appendix to the petition for certiorari, p. 70. This case, like the second phase of the Klamath case in the U.S. District Court, see note 45 above, involved the question whether the Termination Act abrogated the hunting rights.

principle that to name one is to exclude others, the courts could have found that the treaty had affirmatively intended not to protect the unmentioned hunting customs.

The Bureau of Indian Affairs has accepted the principle expressed in the Klamath and Menominee holdings, that these tribes have treaty hunting rights. A Memorandum from Commissioner of Indian Affairs Emmons to the Area Directors, July 2, 1956, states:<sup>47</sup>

"It thus appears, from the only judicial interpretation of the act which has been made [the *Klamath* case, note 45 above], that the intention of Congress was to preserve and protect both express and implied rights, privileges and immunities afforded under Federal treaties, agreements, or statutes with respects to hunting, trapping and fishing. This Bureau will accept the interpretation of the statute as made by the courts and lend such assistance as is possible in preserving and protecting hunting and fishing rights of the Indians."

In short, three courts have held, and two others have agreed in principle, and the Bureau of Indian Affairs accepts the principle, that the 1854 Treaty guaranteed the Menominees' right to hunt and fish free of outside regulation.

### III. The Menominee Termination Act Did Not Abrogate the Tribe's Hunting and Fishing Rights

The Court below found that the Menominee Termination Act did not abrogate the Tribe's hunting and fishing rights. We think this is clearly correct, and it is in accord with the finding of the Wisconsin trial court, the dissent

<sup>47</sup> Referred to and quoted by the Court of Claims, Appendix pp. 21-23, and reprinted in full in the appendix to the first petition for certiorari, No. 930, O.T. 1963, sub.nom. *Sandpaw v. Wisconsin*, at p. 51.

in the Wisconsin Supreme Court, and the two Klamath decisions, notes 45 and 46 above.<sup>47a</sup>

In 1954 Congress enacted the Menominee Termination Act.<sup>48</sup> The purpose of the Act, as recited in its first section, was "to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." The Act did not purport to extinguish any hunting and fishing rights or any other treaty right.

Ordinarily, silence in such a statute would not be interpreted to extinguish Indian treaty rights.<sup>49</sup> But the Wisconsin Supreme Court held that certain other language in the Termination Act had the effect of abrogating the hunting and fishing rights. That was the language transferring civil and criminal jurisdiction over the Menominees to the state government:<sup>50</sup>

"... all statutes of the United States which affect Indians because of their status as Indians shall no

<sup>47a</sup> And is in accord with a memorandum prepared for Congressman Melvin A. Laird, May 22, 1958, by the Legislative Reference Service of the Library of Congress: "The Menominee Tribe and its members would retain exclusive fishing and hunting rights in the reservation streams and forests as long as they continued to live on the reservation and as long as they remained members of the tribe . . . ."

<sup>48</sup> 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902; Appendix p. 33.

<sup>49</sup> See *Squire v. Capoeman*, 351 U.S. 1 (1956), which held that the federal income tax statute, though silent as to any exemption for Indian allotments, did not abrogate the Indians' implied right to be free of income tax on their allotments. See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866); *Choctaw Nation v. United States*, 119 U.S. 1, 27-28, (1886); *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *United States v. Winans*, 198 U.S. 371, 380 (1905); *Winters v. United States*, 207 U.S. 564, 576 (1908); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198 (1919); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), Dept. of the Interior, *Federal Indian Law*, 499 (1958).

<sup>50</sup> 25 U.S.C. § 899; Appendix p. 35.

longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction."

Does this mean that the Wisconsin fish and game regulations now apply to Menominee hunting and fishing activities? If so, the Tribe has totally lost its hunting and fishing rights, for their only valuable incident was their immunity from outside regulation.

The legislative history is not conclusive. Two bills—S.2813 and H.R. 7135<sup>51</sup>—which would have expressly preserved any treaty hunting and fishing rights were supported by the Tribe but were not enacted. The bill which became law was H.R. 2828, which, as stated, was silent on hunting and fishing rights, but two spokesmen for the Department of the Interior agreed that it did not affect treaty rights.

Assistant Secretary of the Interior Orme Lewis advised the Committees that:<sup>52</sup>

"H. R. 2828 contains no provision on this subject. *It does not purport to affect any treaty rights the Indians may have.* If any special hunting and fishing rights have been granted by statute, however, they will be repealed by the provision of the bill making inapplicable all statutes that apply to Indians merely because of their status as Indians." (Emphasis added.)

Mr. Lewis Sigler, Program Counsel of the Bureau of Indian Affairs, testified:<sup>53</sup>

<sup>51</sup> 83rd Cong.

<sup>52</sup> Joint Hearings on H.R. 2828 Before Subcommittees of the Senate and House Interior and Insular Affairs Committees, 83rd Cong. 2d Sess. (March 10, 11, 12, 1954) (Serial 11001) at p. 588.

<sup>53</sup> Id. at p. 629.



"The next difference relates to hunting and fishing rights. The earlier bill [H. R. 2828] does not say anything at all about the subject. It is silent. *And by its silence it, in my judgment, makes no change in any treaty rights that may exist.* However, the earlier bill will repeal any hunting and fishing rights that may have been granted by statute. I do not know of any such rights, but there is the general provision in the bill making inapplicable to these Indians Federal legislation that applies to Indians as such, which would affect any special statute that may be on the books. Again, I do not know of any such statute. *It would not, however, in my judgment, affect the treaty rights, which are not specifically mentioned but are not in conflict with this particular bill.*" (Emphasis added.)

These government officials were well aware of the Menominees' claimed treaty rights, and were saying that if the treaty rights did exist, they were not affected by the bill.

The attorney for the Tribe, Glen A. Wilkinson, attempting to persuade the Committee to adopt S.2813 and H.R. 7135 instead of H.R. 2828, spoke against the latter bill by arguing that its silence would, by implication, abolish the Tribe's rights.<sup>54</sup>

There is no indication as to what views, if any, the Committee members had as to the effect of H.R. 2828 on the Menominees' hunting and fishing rights. Entirely conceivably, they may have decided to leave the matter up to the judiciary. They knew that hunting and fishing rights had been asserted by the Tribe. It would have been inappropriate from any standpoint for the Congress to declare its opinion as to whether the Tribe was correct, and most presumptuous and inequitable to have expressly declared the abolition of any such rights as might exist. It ought not to be presumed that Congress intended to

<sup>54</sup> Id. at 697.

achieve by silence what would have been so inappropriate to declare expressly.

This reasoning is reinforced very strongly by the fact that the State initially assumed jurisdiction over the Menominee Reservation under Public Law 280, not the Termination Act, and Public Law 280 *expressly preserved any treaty hunting and fishing rights the Menominees had*. Public Law 280 states:<sup>55</sup>

"Nothing in this section . . . shall deprive any . . . Indian tribe . . . of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Public Law 280 is a federal statute enacted in 1953, which transferred to certain states civil and criminal jurisdiction over certain Indian reservations.<sup>56</sup> On August 24, 1954, it was amended at the Tribe's request to include the Menominee Reservation among the reservations affected.<sup>57</sup> The Menominee Termination Act did not become effective until April 30, 1961,<sup>58</sup> so that from August 24, 1954, until April 30, 1961, the basis for the State's jurisdiction over the Menominee Reservation was Public Law 280, which as quoted above expressly exempted the Menominees' hunting and fishing rights from state regulation.

Beginning April 30, 1961, the basis for the State's jurisdiction over the Menominee Reservation probably shifted to the Menominee Termination Act, but this jurisdiction under the Termination Act was regarded as incorpo-

<sup>55</sup> 18 U.S.C. § 1162(b).

<sup>56</sup> 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360.

<sup>57</sup> 68 Stat. 795; S.Rept. 2223, 83d Cong. 2d Sess. (1954).

<sup>58</sup> See Proclamation of Secretary of the Interior, 26 Fed. Reg. 3726.

rating the terms of Public Law 280: the Termination Act required that the Tribe prepare a Termination Plan including provisions for law and order and for protection of fish and wildlife.<sup>59</sup> The Plan eventually approved and proclaimed by the Secretary recited that it was unnecessary—<sup>60</sup>

“ . . . to provide specific plans for future handling of law and order [which, as the Court of Claims said, Appendix p. 16, would include hunting and fishing], federal jurisdiction over the Menominee Reservation having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U.S.C. 1162).”

Thus, as the Court of Claims found, the Termination Act, instead of abrogating the Tribe's hunting and fishing rights, actually preserved and protected them.

It is perhaps unnecessary to note that the Tribe's immunity from outside regulation of hunting and fishing was inherent in and was the gist of its hunting and fishing rights. The immunity did not exist merely because (prior to termination) the state lacked general jurisdiction over the Indians on their reservation. If the immunity was based on mere lack of state jurisdiction generally, the Menominees (and Klamaths) have lost that immunity, because the state now does have general jurisdiction over the reservation. Congress obviously intended by the Termination Act to give the state police power over ordinary Menominee activities, and if hunting is merely another ordinary and unprotected Menominee activity, like driving, marrying, etc., then the state now has jurisdiction over Menominee hunting and fishing.

<sup>59</sup> 25 U.S.C. § 896, Appendix p. 34.

<sup>60</sup> 26 Fed. Reg. 3726, 3728 (1961), quoted by the Court of Claims below, Appendix pp. 16-17.

But this theory is not correct, and none of the five courts which has considered the problem has ever accepted it. The Court of Claims and the Wisconsin trial court obviously rejected this theory when they held that the immunity still exists today, even though Wisconsin now does have general jurisdiction over the Menominee Reservation. Even the Wisconsin Supreme Court, which held that the immunity did not exist, did so on the basis that the immunity was "abrogated" by Congress when the Menominee Termination Act became effective, and not on the basis that there never was any inherent immunity.<sup>61</sup>

The two courts in Oregon obviously rejected this theory when they held that the immunity still exists today, even though Oregon now has general jurisdiction over the Klamath Reservation.<sup>62</sup>

The immunity, by the way, as the Court of Claims, the Wisconsin trial court and the two Klamath courts indicated, includes immunity from *all* outside regulation, state and federal. In *United States v. Cutler*,<sup>63</sup> the United States claimed that the Shoshone Indians were subject to the hunting restrictions set forth in the Migratory Bird Treaty. The court rejected this. In *Mason v. Sams*,<sup>64</sup> the Secretary of the Interior tried to impose regulations on Quinault Indian fishing activities, but the court struck them down. It is not a question merely of transferring federal police power to the state, but of an absence of police power altogether, federal or state, over Indian hunting and fishing on the reservation. Of course, Congress has constitutional power to regulate Indian hunt-

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<sup>61</sup> See above, p. 10.

<sup>62</sup> See above, notes 45 and 46.

<sup>63</sup> 37 F.Supp. 724 (D. Ida. 1941).

<sup>64</sup> 5 F.2d 255 (W.D. Wash. 1925).

ing and fishing,<sup>65</sup> but just compensation would lie if the exercise of this power should extinguish the hunting and fishing rights guaranteed by treaty.<sup>66</sup>

#### IV. If the Menominee Termination Act Did Abrogate the Tribe's Hunting and Fishing Rights, Then the Tribe Is Entitled to Just Compensation

We have shown that the Tribe's hunting and fishing rights were guaranteed by treaty, that they are valuable property rights, and that their only valuable incident is their freedom from outside governmental regulation. Consequently, if contrary to our argument in Point III they are now subject to state regulation, then they have been extinguished and just compensation lies.

The United States has always recognized that Indian hunting and fishing rights are valuable tribal assets. For example, see the Fort Laramie Treaty,<sup>67</sup> whereby the United States promised to pay the Indians for damages resulting from white activities authorized by the treaty. The minutes of the treaty negotiations state:<sup>68</sup>

"The ears of your Great Father are always open to the complaints of his Red Children. He has heard and is aware that your buffalo and game are driven off, and your grass and timber consumed by the opening of roads and the passing of emigrants through your countries. For these losses he desires to compensate you. He does not desire that his White Children shall drive off the Buffalo and destroy your

<sup>65</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); Department of the Interior, *Federal Indian Law* 499 (1958).

<sup>66</sup> *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937). There are no incidents of the hunting right in this case beyond the immunity from restrictions. Cancellation of the immunity, therefore, would extinguish the hunting right.

<sup>67</sup> 11 Stat. 749 (1851).

<sup>68</sup> The St. Louis Republican, October 26, 1851.



hunting-grounds, without making you just restitution."

There is even precedent for the payment for compensation for the loss of the right to hunt free of state regulation. The Shoshones had an off-reservation hunting right pursuant to the Fort Bridger treaty. In 1896 this Court held that the exercise of the right was subject to state hunting regulations outside the reservation.<sup>69</sup> Following the decision, Congress paid the tribe \$75,000 as "reparation" for the loss.<sup>70</sup> This of course was not a judicial finding that just compensation lay, but at least reflects a feeling by Congress that a payment was due.

In 1864, Congress authorized the President to negotiate with the Confederated Tribes of Middle Oregon for a relinquishment of their off-reservation hunting and fishing rights, and appropriated \$5,000 to pay for such rights.<sup>71</sup>

Consider the *Celilo Falls* case.<sup>72</sup> In that case the construction of a dam on the Columbia River at The Dalles inundated a number of Indian fishing locations. These locations were desirable because the rocks were like stepping stones extending out into the river, channeling the water and enabling fishermen easily to spear or net the

<sup>69</sup> *Ward v. Race Horse*, 163 U.S. 504.

<sup>70</sup> S. Rept. 69, 56th Cong. 1st Sess. 2 (1900):

"The price agreed [for a cession of land] was \$525,000, or about \$1.25 per acre, to which was added \$75,000 as a reparation for the right to hunt in Wyoming, which was given them [Indians] by the Fort Bridger treaty and of which they were deprived by the decision of the United States Supreme Court, May 25, 1896."

<sup>71</sup> 13 Stat. 324. See also 54 Stat. 703 (1940) and 43 Stat. 117 (1924), specifically reserving certain hunting and fishing rights in new reservoirs in lieu of previous rights.

<sup>72</sup> Many of the facts appear in *Whitefoot v. United States*, 155 Ct.Cl. 127, 293 F.2d 658 (1961), *cert. den.*, 369 U.S. 818.

passing fish. After protests from the Indians the Corps of Engineers of the U.S. Army negotiated a settlement with the tribes involved, primarily the Yakimas, in the amount of almost \$27,000,000, which Congress approved and paid.

It is interesting to note that the Celilo payment was not for loss of fish, because the dam did not block the passage of fish (the Indians are still fishing today near their old locations), but for loss of advantageous fishing sites. Similarly, the Menominee Reservation is still inhabited by fish and game, but if the Wisconsin Supreme Court is right, they have lost the right to catch them whenever and by whatever methods the Tribe may decide are permissible.

In a claim brought under a special jurisdictional act, the Tlingit Indians have been held entitled to compensation for the fact that white men appropriated the Indian fisheries and frightened game away.<sup>73</sup> The Court of Claims said in that case:<sup>74</sup>

"The most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others."

The Court of Claims below said in this case that "The right to hunt and fish Indian fashion is a valuable property right."<sup>75</sup>

"Several non-Indian cases recognize that diminution of the freedom to hunt or fish may constitute a taking calling for just compensation. In *Allen v. McClellan*,<sup>76</sup> the New Mexico Game Commission established a game ref-

<sup>73</sup> *Tlingit and Haida Indians v. United States*, 147 Ct.Cl. 315, 177 F.Supp. 452 (1959).

<sup>74</sup> 177 F.Supp. at 468.

<sup>75</sup> Appendix p. 12.

<sup>76</sup> 75 N.M. 400, 405 P.2d 405 (1965).

uge, and the landowner's land happened to be in the middle of it. The commission forbade him to hunt on his land. The court held that the commission had no power to do this without paying just compensation:

"It is our view that the commission may not create a game refuge or migratory bird resting ground on private land without consent, or without acquiring the necessary interest in the land by eminent domain or in such other manner as is authorized by the law.

"It is also our view that the inclusion of private land within such a game management area for the purpose of providing a place for migratory birds 'to rest and feed unmolested' may result in consequential damage to the owner of private land included therein . . . ."

In *Alford v. Finch*,<sup>77</sup> the same thing happened in Florida, with the same judicial reaction:

"The predominant feature in the instant case is the taking, with neither consent nor compensation, by appellant from the appellees, of a property right—the right to pursue the game on their land. It is our view that the Commission is empowered to regulate the taking of game and to acquire property, by purchase and gift, for its use but that under the authority delineated in the constitution, it is not, under the guise of regulation or otherwise, empowered to take private property for public purpose without just compensation."

A case decided by the Court of Claims is relevant on the issue of just compensation for the diminution of hunting and fishing rights. In *Todd v. United States*,<sup>78</sup> claims by private citizens were made for just compensation for

<sup>77</sup> 155 So. 2d 790 (Fla. 1963).

<sup>78</sup> 155 Ct.Cl. 87 (1961). See also, companion case, *Todd v. United States*, 155 Ct.Cl. 111 (1961), and similar case, *Jackson v. United States*, 122 Ct.Cl. 197 (1952).

loss of fishing rights. Plaintiffs had licenses from the State of Maryland to fish in certain locations in Chesapeake Bay. In 1943, the Secretary of War issued danger zone regulations, which imposed onerous restrictions on plaintiffs' exercise of their fishing rights. The Court of Claims held that there was a taking, and that the right to fish granted to plaintiffs by state license constituted a property right, the loss of which was compensable under the Fifth Amendment to the Constitution. The Court went on to state that:<sup>79</sup>

"The consequences of defendant's taking of plaintiffs' property rights granted by those licenses cannot be avoided by granting to plaintiffs permission to make limited use of those rights under conditions which proved altogether worthless."

The *Todd* plaintiffs had a vested fishing right. It was not an absolute right, but was subject to the usual state fishing regulations and to certain restrictions imposed by the state when the right was granted.<sup>80</sup> It was not even a permanent right, but was subject to application for annual renewal. However, when the United States imposed additional restrictions on the right, even though in aid of the prosecution of the war, a public purpose, just compensation was due. Here, the Menominees had an unrestricted and permanent right to hunt and fish within the boundaries of their reservation guaranteed by treaty. If their right is now subject to state restrictions, they are at least as entitled to compensation as the *Todd* plaintiffs.

<sup>79</sup> 155 Ct.Cl. at 97.

<sup>80</sup> The state restrictions are set forth in 155 Ct.Cl. at 101-102.

**CONCLUSION**

The Treaty of 1854 guaranteed the right of the Menominee Tribe to hunt and fish free of outside interference. Congress did not intend the extinction of this right when it enacted the Menominee Termination Act. Consequently, the Menominee Indians are free today to hunt and fish within the boundaries of their reservation without regard to state fish and game regulations. But if the right was extinguished, then the Menominees are entitled to just compensation for the loss of such right.

Respectfully submitted,

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November 24, 1967





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In the  
**SUPREME COURT of the UNITED STATES**

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October Term, 1967

**No. 187**

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THE MENOMINEE TRIBE OF  
INDIANS, et al.

v.

THE UNITED STATES

---

**BRIEF OF THE STATE,  
OF WISCONSIN, AMICUS CURIAE**

---

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**BRIEF OF THE STATE  
OF WISCONSIN, AMICUS CURIAE**

---

INTEREST OF THE AMICUS CURIAE

The decision of the Court of Claims is in direct opposition to the holding of the Wisconsin Supreme Court in *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 124 N. W. (2d) 41, cert. den. 377 U. S. 991. In that case it was held that the exclusive hunting and fishing rights granted to the Menominee Indians by the Wolf River Treaty of 1854 (10 Stat. 1964) were abrogated by the so-called "Termination Act" (25 U. S. C. secs. 891-902).

The Menominees commenced an action in the United States Court of Claims to recover compensation from the federal government for the taking of these rights. In granting the government's motion for summary judgment and

dismissing the petition, the court held that the treaty rights referred to above were not abrogated by the Termination Act. In the course of its opinion, the court intimated that if these rights have been interfered with, it is due to the action of the State of Wisconsin acting through its supreme court and law enforcement officials. As a result of this opinion, and its threat of liability, the State of Wisconsin has a keen interest in the resolution of the issues before this court, and disagrees wholeheartedly with the lower court's opinion in this respect. The Wisconsin Supreme Court, following the mandate of a federal law which, we submit, is clear in its abrogation of Menominee hunting and fishing rights, cannot in any way subject the state to liability.

In addition, the State of Wisconsin, as the traditional home of the Menominee people, has a clear interest in a final determination of the question of the efficacy of its fish and game laws within the borders of the former Menominee Indian Reservation which, since the Termination Act, has been a duly organized Wisconsin county.

It is our conviction that the treaty rights of the Menominees were indeed cut off by Congress and ~~that the~~ United States is fully and solely liable therefor.

### SUMMARY OF ARGUMENT

The Wolf River Treaty of 1854 granted to the Menominees an unqualified right to hunt and fish their lands, free from all outside regulation. Thus, these rights are not derived from aboriginal user, but from a formal treaty with the United States.

Congress has always had plenary power to deal with Indians, and may pass laws in conflict with treaties made with Indians just as Congress may pass laws in conflict with treaties made with foreign nations. Thus, Congress the power to abrogate Indian privileges and rights, including treaty rights, by statute.

The Menominee "Termination Act," Public Law 399, 83rd Congress, terminates federal trusteeship over the Menominee Indians and their lands, which formerly comprised the Menominee Indian Reservation. The Act also provides that the laws of the several states are applicable to the Menominee Indians in the same manner that such laws are applicable to other citizens within the states. The Act contains no reservation of hunting and fishing rights or privileges in favor of the Indians. Thus, the Act had the effect of abrogating these rights.

The legislative history of the Termination Act does not support an interpretation contrary to the plain and ordinary meaning of the words.

First, the legislative history shows that Congress was advised that the language of the Act would extinguish the hunting and fishing rights, yet Congress made no express reservation preserving such rights.

Secondly, the contemporaneous enactment of Public Law 280 does not indicate any legislative intent as to the preservation of hunting and fishing rights under the Termination Act. Nor does the reference to Public Law 280 in the Termination Plan lead to any similar inference. Rather, it leads to the inference that Congress intended state law regarding the management of fish and wildlife



was to apply in the same manner that state law regarding the maintenance of law and order was to apply.

The abrogation of exclusive hunting and fishing rights under the Termination Act constitutes a loss of valuable property rights, and is compensable by the federal government.

## ARGUMENT

I. THE MENOMINEE INDIAN TERMINATION ACT (P. L. 399, 83rd CONG), BY ITS PLAIN LANGUAGE, ABROGATED THE EXCLUSIVE HUNTING AND FISHING RIGHTS OF THE MENOMINEE INDIANS WHICH WERE GRANTED TO THEM BY THE WOLF RIVER TREATY OF 1854.

*A. The hunting and fishing rights of the Menominee Indians arose from treaties with the United States.*

The treaty of May 12, 1954, known as the treaty of Wolf River, created the Menominee Indian Reservation through a cession of certain lands to the Menominees "to be held as Indian lands are held." 10 Stat. 1064. Both the Wisconsin Supreme Court, and the United States Court of Claims in the decision now under review, held that the language of the 1854 treaty granted to the Menominees an unqualified right to hunt and fish their lands free from all outside regulation and control. *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 383, 124 N. W. (2d) 41; *Menominee Tribe v. United States* (1967), — Ct. Cl. —, — Fed. (2d) —.\* See also *Menominee Tribe v. United*

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\*No reported decision of the court below being available to the *amicus curiae*, all page references to the Court of Claims opinion will be the printed decision, dated April 14, 1967.

*States* (1941), 95 Ct. Cl. 232, 240-241; *Moore v. United States* (9th Circ. 1946), 157 F. (2d) 760, cert. den. 330 U. S. 827.

Thus, the rights of the Menominees in this respect do not derive from aboriginal user, but from a formal treaty with the United States government.

B. *Congress has plenary power to deal with the Indians and may abrogate Indian privileges and rights, including treaty rights, by statute.*

The extent to which tribal Indians should be emancipated from their status as wards of the Federal Government is a matter which rests entirely within the discretion of Congress. *Lone Wolf v. Hitchcock* (1903), 187 U. S. 553, 565-567; *United States v. Waller* (1917), 243 U. S. 452, 459-460. The power to make treaties with Indian tribes was abolished in 1871 (16 Stat. 544, 566; 25 U. S. C. sec. 71), and the United States now deals with Indians by statute.

Congress has plenary power to deal with Indians and may abrogate Indian privileges and rights, including treaty rights, by statute. *Super et al. v. Work* (CCA, D. C., 1925), 3 F. (2d) 90, affirmed per curiam, 271 U. S. 643. The power of Congress over Indian tribes and tribal property cannot be limited by treaty so as to bar repeal or amendment by later statute. *Ward v. Race Horse* (1896), 163 U. S. 504; *Lone Wolf v. Hitchcock* (1903), 187 U. S. 553, 565-567; *United States v. Waller* (1917), 243 U. S. 452; *Anderson v. Gladden* (CCA 9th, 1961), 293 F. (2d)

463, Cert. denied 368 U. S. 949. See also, *Cain v. First Nat. Bank of Oregon* (9th Cir. 1963), 324 F. (2d) 532.

In *Lone Wolf v. Hitchcock*, *supra*, this court stated (187 U. S. at pp. 565-566):

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued by dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U. S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas v. Gay*, 169 U. S. 264, 270; *Ward v. Race Horse*, 163 U. S. 504, 511; *Spalding v. Chandler*, 160 U. S. 394, 405; *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 117; *The Cherokee Tobacco*, 11 Wall. 616.

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. \* \* \*

See also *Chemah v. Fodder* (D. C., W. D. Okla., 1966), 259 F. Supp. 910, 914.

While it is submitted that the foregoing establishes the power of Congress to abrogate Indian privileges and rights, including treaty rights, by statute and to terminate the status of Indians and Indian tribes as wards of the Federal Government, it is of interest to note that a subsequent Menominee Indian Treaty executed on February 11, 1856 (11 Stat. 679), provides in part as follows:

"ARTICLE 3. To promote the welfare and the improvement of the said Menomonees, and friendly relations between them and the citizens of the United States, it is further stipulated—

"1. That in this agreement and the treaties made previously with the Menomonees should prove insufficient, from causes which cannot now be (be) foreseen, to effect the said objects, the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of the affairs of the Menomonees as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provision by law, as experience shall prove to be necessary."

- C. *The Menominee "Termination Act" specifically provides that following termination all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the Menominee Indians, and that the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*

In 1954 Congress provided for the termination of all federal supervision and control over the Menominee Indian Tribe and the Menominee Indian Reservation by Public Law 399, 83rd Congress, popularly known as the "Termination Act" (68 Stat. 250, as amended, 70 Stat. 544, 70 Stat. 549, 72 Stat. 290, 74 Stat. 867; 25 U. S. C. secs. 891-902). On April 29, 1961, the Secretary of the Interior proclaimed the transfer, pursuant to sec. 8 of the Termination Act, of all tribal property held in trust by the United States Government, and the termination of all federal supervision and control over the Menominee Indians and the Menominee Indian Reservation effective midnight April 30, 1961 (26 Fed. Reg., No. 82, April 29, 1961, at page 3726). Upon publication of the plan in the Federal Register in connection with the cited proclamation by the Secretary of the Interior, Ch. 259, Wis. Laws 1959, became effective, and what was formerly the Menominee Indian Reservation became Wisconsin's 72nd county (Wis. Laws 1959, Ch. 259, sec. 42).

The Termination Act (25 U. S. C. secs. 891-902) provides in pertinent part as follows:

§ 891. The purpose of sections 891-902 of this title is to provide for orderly termination of Federal super-



vision over the *property and members* of the Menominee Indian Tribe of Wisconsin.

“§ 896. The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. \* \* \* The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. *The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife.* \* \* \*

§ 899. When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, *all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.* Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States.” (Emphasis added.)

The intent of Congress in passing the "Termination Act" was to terminate federal trusteeship over the Menominee Indians, to abolish the Menominee Indian Reservation, and to make the laws of the several States applicable to the Menominee Indians in the same manner that such laws are applicable to other citizens within the states. This is evident not only from the face of the Termination Act itself, but from *House Concurrent Resolution 108* (67 Stat. B132, 83rd Congress, First Session) which declares as follows in part:

"Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States; and to grant them all of the rights and prerogatives pertaining to American citizenship; and Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it

"Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: . . . the Menominee Tribe of Wisconsin . . ." (Emphasis added.)

The Act contains no reservation of hunting rights or privileges in favor of the Indians. The Indian reservation has been abolished, (Cf. *Organized Village of Kake v. Egan* (1962), 369 U. S. 60, 74) and the status of the Menominee Indians and the Menominee Indian Tribe as wards of the Federal Government has been ended.

In 26 Federal Register, No. 82, April 29, 1961 at page 3726, the Secretary of the Interior proclaimed the transfer of title to all property real and personal held in trust by the United States for the Menominee Indian Tribe, as follows:

"Pursuant to the authority contained in section 10 of the Act of June 17, 1954 (Public Law 83-399; 68 Stat. 250), it is hereby proclaimed that the title to all property, real and personal, held in trust by the United States for the Menominee Tribe has been transferred in accordance with section 8 of the Act of June 17, 1954, *supra*, and that effective midnight April 30, 1961, individual members of the Menominee Tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians; all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Menominee Tribe; and the laws of the several States shall apply to the Menominee Tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

"As required by section 7 of the Act of June 17, 1954, *supra*, the Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions is published and appears immediately below this notice."

Thus, through the Termination Act, the United States has divested itself of all right, title and interest to the lands which comprise what was formerly the Menominee Indian Reservation, and has ended its trusteeship over the lands. Title to the forest land is now held by Menominee Enterprises, Inc., a private Wisconsin stock corporation. Title to certain parcels of land has been conveyed by the corporation to individuals for homesites. What was formerly the reservation is now Wisconsin's 72nd county, governed by a Wisconsin County Board and a Town Board. (Wis. Laws, 1959, Ch. 259.) The entire land area is now on the tax rolls. Enrolled members of the Tribe are residents of the town and county, are subject to the State's tax laws, and elect town and country officers (Wis. Laws, 1959, Ch. 259).

Thus, the effect of the Termination Act has been to abolish the federal trusteeship over the person and property the Menominees. Wise or unwise, it is an accomplished fact, and in its accomplishment Congress abrogated the exclusive hunting and fishing of the Menominees which had been secured to them by the Treaty of 1854.

II. THE LEGISLATIVE HISTORY OF THE TERMINATION ACT DOES NOT CHANGE THE IMPORT OF THE LANGUAGE THEREOF, WHICH GIVEN ITS PLAIN AND ORDINARY MEANING, WOULD EXTINGUISH THE MENOMINEES' PRE-EXISTING HUNTING AND FISHING RIGHTS.

A. Pertinent Documents reveal congressional awareness of the fact that the language of the Termination Act would abrogate these rights.

Sec. 891 of the Termination Act provides that the purpose "is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." Sec. 899 of the act provides that upon the Secretary of the Interior's publishing a proclamation in the Federal Register that all tribal property has been transferred in accordance with the act, "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

The italicized statutory language, given its plain and ordinary meaning, would subject the Menominees' pre-existing exclusive hunting rights to the state's game laws. However, the court below felt that the legislative history surrounding the enactment of the Termination Act precludes such an interpretation because it shows that this was not the intent of the Congress.

The original bill, which was finally enacted by the 83d Congress in 1954 as the Termination Act, originated



in the House of Representatives as H. R. 2828. Two other companion bills to provide for the withdrawal of the Menominee Tribe from federal jurisdiction were also introduced, the one in the Senate being S. 2813, and the one in the House of Representatives being H. R. 7135. Joint hearings on all three bills were held before subcommittee of the Committee on Interior and Insular Affairs of the Senate and the subcommittee of the Committee on Interior and Insular Affairs of the House of Representatives on March 10, 11, and 12, 1954. Both S. 2813 and H. R. 7135 contained express provisions which preserved any special hunting and fishing rights the Menominees might have by treaty, statute, custom, or judicial decision. H. R. 2828 contained no such corresponding provision.

The court below referred to the testimony of two witnesses appearing before the house committee who expressed their opinion that H. R. 2828's silence on the subject would not affect hunting and fishing rights acquired by treaty, but only those acquire by statute (opinion, p. 8). It should be noted, however, that neither witness mentioned the provision of H. R. 2828 (now sec. 899 of the Act) stating that: "*the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.) See "Joint hearings Before the Subcommittee of the Committees on Interior and Insular Affairs, Congress of the United States, Eighty-Third Congress, Second Session on S. 2813, H. R. 2828 and H. R. 7135." (Hereafter referred to as "Joint Hearings.")

It is also the fact, barely alluded to by the court below, that the *general counsel* for the then Menominee

Tribe, Mr. Glen Wilkinson, filed a memorandum with joint Senate House hearings on the termination bills, testified at the hearings, and in both his memorandum and testimony he specifically disagreed with the other witnesses, and stated that H. R. 2828 would, by its silence, abrogate Indian hunting and fishing rights.

In his memorandum, Mr. Wilkinson stated in part (Joint Hearings, pp. 697, 704):

"On page 4 (item 7) the statement is made that 'H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have.' Whether it 'purports' to affect such treaty rights seems immaterial; the fact is that it does, at least by implication, abolish the tribal rights to exclusive hunting and fishing privileges within the reservation—rights which were solemnly assured to the tribe in perpetuity."

Mr. Wilkinson testified, in part:

"I just want to comment briefly on a few points included in the Department's report of March 5. As I have already noted, I think they have a good point respecting section 3. On page 4, item 7 of that report, the statement is made that H. R. 2828 contains no provision on this subject. It goes on to say that it does not purport to affect any treaty rights the Indians may have.

"I have already covered this somewhat, but in my judgment I think it is clear that it does affect those treaty rights and that those treaties are abrogated. Certainly it abolishes the tribal right to exclusive hunting and fishing privileges, because automatically upon the final termination date, the Menominee Reservation so far as hunting and fishing is

concerned, would become subject to the laws of Wisconsin." (Joint Hearings, p. 708, Emphasis added.)

Thus advised by the General Counsel for the tribe, and with an alternative bill before it which would have expressly reserved hunting and fishing rights (H. R. 7135), Congress enacted the bill which was silent to such rights. From this it is clear that Congress did not intend to preserve hunting privileges in favor of the Indians following termination. The court below, while not discussing this testimony, disagreed for two reasons: (1) the subsequent passage of Public Law 280; and (2) the reference to Public Law 280 contained in one portion of the termination plan.

*B. The enactment of Public Law 280 does not justify the court's interpretation of the Termination Act as preserving the hunting and fishing rights of the Menominees.*

The Termination Act was passed on June 17, 1954 (P. L. 399, 83rd Congress—68 Stat. 250). A few months later, Congress extended the provisions of P. L. 280 to the Menominee Indian Reservation (P. L. 661, 83rd Congress, 2nd session, August 24, 1954, 68 Stat. 795). Public Law 280, as amended, conferred civil and criminal jurisdiction over the Menominee Indian Reservation upon the state, and expressly reserved to the United States jurisdiction over hunting and fishing, water, and certain property rights. Public Law 280 (18 U. S. C., sec. 1162, 28 U. S. C., sec. 1360), provides in part as follows:

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

\* \* \*

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian of any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

\* \* \*

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of

general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

\* \* \*

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance of custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

The court of Claims, in the decision under review, stated (p. 10):

"It is logical to assume that the Congress, acting through its committees . . . as well as by its own action as a whole, knew that hunting and fishing rights were being protected in Public Law 280 and there was no need to mention them in the Termination Act."



The court has given no evidence even hinting such a legislative state of mind, and we have been unable to find any such suggestion in the hearing reports and other documents bearing upon the Termination Act—which is, after all, the legislation being interpreted by the court.

It is submitted that this type of speculation is insufficient to overcome the plain language of the Termination Act, buttressed by the inescapable fact that the tribe's general counsel made it clear to the committee considering the bill that, in his opinion, failure to specifically reserve these rights would result in their abrogation. With this advice, and with an alternative bill before it which would have expressly reserved hunting and fishing rights (H. R. 7135), Congress enacted the "silent" version of the bill. It follows that Congress had no intention to reserve these rights to the Menominees following termination.

*C. The Reference to Public Law 280 in one portion of the Termination Plan does not require the construction of the Termination Act adopted by the Court below.*

As indicated above, the Termination Act required the Tribe to prepare a plan which, when approved and proclaimed by the Secretary of the Interior, would effectuate the termination. The court below quoted from sec. 7 of the Act requiring the plan to provide for protection of the forest, water, soil, fish and wildlife. 25 U. S. C. § 896. The court then quoted certain language from the plan as submitted mentioning that federal jurisdiction over the Menominee Reservation had been surrendered by the

United States by Public Law 280. The text, as quoted by the court, reads as follows (p. 11):

"It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menominee Reservation having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U. S. C. 1162)."

It is clear from this excerpt, as well as from the court's own language, that the quoted portion of the plan pertains to "law and order"—it does not refer to hunting and fishing rights. It is merely the fulfillment of another portion of sec. 7 of the Termination Act which provides as follows (25 U. S. C. sec. 896):

"The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision."

It cannot be said that, by referring to Public Law 280 in connection with a specific requirement dealing with "law and order," the provisions thereof are incorporated into another portion of the plan pertaining to the protection of forests, soil, water, fish and wildlife. The legislative requirements for inclusion of these items in the plan appear in different portions of sec. 7 of the Act.

Even if the chain of inferences may be so extended, it furnishes no basis for declaring the intent of Congress, in passing the Termination Act, to "protect and preserve" rights which the plain language of the act abrogates.

There is another, far more tenable, inference that may be drawn from all this, and that is the inference that Congress, in abrogating the exclusive and unrestricted hunting and fishing rights of the Indians, intended that state law should apply and that the plan itself, which was submitted to the Secretary of the Interior for approval, should reflect the adequacy of the state law to protect fish and wildlife. This conclusion is supported by the fact that the Termination Act also required that the plan provide for "... protection of the forest on a sustained yield basis ...," and authorized the Secretary of the Interior to accept the tribe's plan provided that he found "... that it conforms to applicable Federal and State law" (25 U. S. C. 896). Significantly, the plan itself provides for protection of the forest on a sustained yield basis, as required by 25 U. S. C. sec. 896, and state legislation for that specific purpose was enacted (Wis Laws 1959, ch. 258; see *Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions*, 26 Fed. Reg. No. 82, April 29, 1961, p. 3727 et seq.). The plan, on the other hand, contains no express provision for the protection of fish and wildlife. It is therefore fair to conclude that, in view of the abrogation of the Indian's rights in this area, a separate provision for protection of fish and wildlife was unnecessary since such protection would be provided by the application of Wisconsin's conservation laws to the land and its people.

It should also be noted that the Wisconsin Supreme Court was apprised of the contemporaneous passage of Public Law 280 in *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 124 N. W. (2d) 41, cert. den. 377 U. S. 991. The brief filed by the State of Wisconsin in opposition to a motion for rehearing in that case devoted 3-5 pages to a discussion of P. L. 280, and quoted extensively from its text.

### III. TREATY HUNTING AND FISHING RIGHTS CONSTITUTE VALUABLE PROPERTY, AND THEIR LOSS IS COMPENSABLE.

Since this question will be discussed by the claimants, the Menominee Tribe, et al., the State of Wisconsin, as *amicus curiae*, will do no more than state its contention that the exclusive hunting and fishing rights held by the Menominees under the provisions of the Treaty of 1854, were abrogated by the United States through the enactment of 25 U. S. C. secs. 891-902, and that, such rights being valuable property rights, their loss is compensable by the federal government.

The State of Wisconsin, through its supreme court and law enforcement officers, was merely carrying out the Congressional mandate in applying its fish and game laws to the Menominees, *State v. Sanapaw, supra*, and is in no way liable for the loss suffered by the Menominee people, as intimated by the court below.

#### IV. CONCLUSION.

The Congress of the United States has plenary power over the affairs of the Indians and Indian Tribes. By the express terms of the Termination Act the United States Congress has abolished the Menominee Indian Reservation, and has ended the Federal trusteeship over the Menominee Indian people. Accordingly, the reservation area and the enrolled members of what was formerly the Menominee Indian Tribe are now fully assimilated under the laws of the State of Wisconsin.

Section 899 of the Termination Act is clear and unambiguous. By its express terms, the laws of Wisconsin, without exception, apply to the members of the tribe in the same manner and to the same extent as they apply to other citizens within the state. Conflicting views concerning the effect of the Act (H. R. 2828) upon hunting and fishing by the Menominees were presented at the joint hearing of the committees of Congress. Thus, advised and with an alternative bill before it which expressly reserved hunting and fishing privileges (H. R. 7135), Congress enacted the bill which did not reserve such privileges. And, when Congress intends that hunting or fishing privileges enjoyed by Indians be preserved when state jurisdiction over Indians is enlarged by federal act, it has expressed so provided. In P. L. 280 (67 Stat. 588), *supra*, hunting and fishing rights were expressly exempted. In the Klamath Termination Act, water and fishing rights and privileges of the Indians, under Federal treaty, were expressly preserved (68 Stat. 718, 722; 25 U. S. C., sec. 564m). Thus Congress is not unmindful of the matter, and indeed the issue was specifically raised at the hearings on the Menominee bills.



The plain intent of Congress to abrogate these rights is not overcome by the contemporaneous passage of Public Law 280, nor by oblique reference to this law is an unrelated portion of the termination plan.

The rights so abrogated by the United States are valuable property rights arising from treaty, and their loss is compensable by the federal government.

The State of Wisconsin, *amicus curiae*, respectfully urges the Court to reverse the decision of the Court of Claims herein, insofar as it holds that the exclusive treaty rights of the claimants, the Menominee Tribe of Indians, et al., have not been abrogated by the Menominee Termination Act, and that the United States is not liable therefor.

Accordingly, it is urged that the judgment granting the government's motion for summary judgment and dismissing the petition of the plaintiffs be vacated and set aside.

Respectfully submitted,

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State Capitol  
Madison, Wisconsin

DEC 22 1967

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Claims

**BRIEF OF ASSOCIATION ON AMERICAN INDIAN  
AFFAIRS, INC., AS AMICUS CURIAE**

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FRANK & KAMPELMAN



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

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No. 187

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**MENOMINEE TRIBE OF INDIANS, *Petitioner,***

**V.**

**UNITED STATES OF AMERICA, *Respondent.***

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**On Writ of Certiorari to the United States Court of Claims**

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**BRIEF OF ASSOCIATION ON AMERICAN INDIAN  
AFFAIRS, INC., AS AMICUS CURIAE**

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**STATEMENT OF INTEREST**

The Association on American Indian Affairs, Inc., a non-profit membership corporation chartered under the laws of the State of New York, is devoted to protecting the rights and promoting the welfare of American Indians. The largest Indian-interest organization in the country, the Association supports or conducts develop-

ment programs among Indian communities which range from Eskimo villages north of the Arctic Circle in Alaska to the newly recognized Miccosukee Tribe residing in the Florida Everglades. Because of its deep and longstanding concern with the rights of Indians under the Constitution, statutes and treaties of the United States, the Association has submitted briefs, *amicus curiae*, to this Court in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), and *Puyallup Tribe v. Department of Game*, No. 247, October Term, 1967, and to various Federal Courts of Appeals in such leading cases as *Oliver v. Udall*, 306 F. 2d 819 (D.C. Cir. 1962), *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956), and *Arizona v. Hobby*, 221 F. 2d 498 (D.C. Cir. 1954).

The Association's particular interest in the case at bar is to assist the Menominee Indians in their effort to recover from the tragic impact upon their economy of the premature termination of Federal services under the Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. 891 *et seq.* Though, once relatively prosperous in comparison with other Indian tribes, the Menominees are known to have become increasingly destitute since passage of the 1954 Act. See, for example, 111 *Cong. Rec.* 5922-923 and 22929-930 (remarks of Senator Proxmire, March 25 and September 7, 1965) and 6390 *et seq.* (remarks of Congressman Laird, March 30, 1965). Accordingly, as a matter of necessity and as their ancestors did in bygone years, many tribal members today still depend upon subsistence hunting for a significant portion of their livelihood. It is to safeguard this essential present activity and thus to maximize future tribal resources that the Association here urges this Court to affirm the decision below, holding that the



Menominees have a treaty right to hunt on reservation lands without regard to State law, and to reject the contrary ruling of the Wisconsin Supreme Court in *State v. Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41 (1963).

The Association also has an abiding interest in resolution of the broad legal issue posed in the case at bar as to the extent rights enjoyed by Indian tribes under treaties or special statutes may survive general language in a termination act providing, *inter alia*, that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." Act of June 17, 1954, *supra*, 25 U.S.C. 899. As is pointed out in the opinion below (Appendix, pp. 19-21), the United States District Court in Oregon and a lower State court both have construed an identical section of the Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. 564, 564q, as leaving unimpaired the treaty right of members of the Klamath and Modoc Tribes to hunt inside their diminished reservation without regard to State law. Moreover, the Association has just filed a brief *amicus curiae* in *Reynos v. First Security Bank*, Civil No. C-39-65, now pending before the United States District Court for Utah, which argues that certain assets of the so-called mixed-blood Utes remained trust or restricted property even after issuance of a termination proclamation pursuant to the Act of August 27, 1954, 68 Stat. 868, 25 U.S.C. 677, 677v. A decision by this Court on the immediate issue of Menominee hunting rights, therefore, will have ramifications in Indian country far beyond the borders of the State of Wisconsin.

This brief is filed pursuant to Rule 42(2) of the Supreme Court Rules. Written consent of all parties to its submission accompanies the signed original copy of the brief.

### QUESTION PRESENTED

Whether the 1954 Menominee Termination Act, which is silent about hunting and fishing rights, by implication repealed the right of Menominee Indians under the Treaty of May 12, 1854, 10 Stat. 1064, to hunt on reservation lands without regard to State law.

### ARGUMENT

#### I. The Menominee Indians Have a Property Right Under the Treaty of May 12, 1854, To Hunt on Tribal Lands Without Regard to State Law.

In Article 2 of the Treaty of May 12, 1854, *supra*, the United States granted to the Menominee Indians "for a home, to be held as Indian lands are held," a tract of land in the State of Wisconsin which constitutes, with exceptions not here material, the present-day Menominee Reservation. At the time of the 1854 Treaty, State law did not apply to the activities of Indians within the Menominee Reservation or, for that matter, with respect to Indian affairs on any other tribal lands within the State of Wisconsin. The Court of Claims in this case and the Wisconsin Supreme Court in *State v. Sanapaw*, *supra*, both have ruled that the 1854 Treaty thus vested in the Menominee Indians a right to hunt on their reservation lands without regard to State law. These holdings are consistent with the decisions of this Court and lower Federal courts that, since Indian treaties contemplate retention by the tribes in lands set aside for their use of all previously existing privileges and immunities, the right to hunt

or fish within the boundaries of a reservation exclusive of State restrictions does not depend upon the existence of express treaty language so providing. *United States v. Winans*, 198 U.S. 371, 381 (1905); *Moore v. United States*, 157 F. 2d 760, 765 (9th Cir. 1946); *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore. 1956); see *Winters v. United States*, 207 U.S. 564 (1908).

The Federal Government's grant of land to the Menominee Tribe under the 1854 Treaty, and the corollary right of the Indians to hunt on their reservation without regard to State law, furnished a major part of the consideration for the cession to the United States of substantial and valuable interests in other lands possessed by the Menominees under the Treaty of October 18, 1848, 9 Stat. 952. The right to hunt free of interference from the State of Wisconsin, therefore, just as much as the land itself, constitutes a compensable property interest, the taking of which may not be accomplished without action of Congress and payment of just compensation. *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937); *United States v. Winans*, *supra*; *Whitefoot v. United States*, 293 F. 2d 658, 663 (Ct. Cl. 1961); *Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 468 (Ct. Cl. 1959).

**II. The Treaty Right of Menominee Indians To Hunt on Tribal Lands Without Regard to State Law Survived the Menominee Termination Act of June 17, 1954.**

Section 10 of the Menominee Termination Act of June 17, 1954, *supra*, 25 U.S.C. 899, provides in part that, following publication of a proclamation to such effect by the Secretary of the Interior in the *Federal Register*, "all statutes of the United States which affect

Indians because of their status as Indians shall no longer be applicable to the members of the [Menominee] tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." With the possible exception of a requirement that the Menominee termination plan include provisions for "protection of the water, soil, fish and wildlife" (25 U.S.C. 896), the 1954 Act is wholly silent about hunting and fishing within the Menominee Reservation. After a detailed study of its legislative history, the court below concluded that Congress, in making certain "statutes of the United States" inapplicable to the Menominees under Section 10 of the 1954 Act, did not also intend to abrogate the tribe's right under the Treaty of May 12, 1854, *supra*, to hunt on the reservation without regard to State law. Appendix, pp. 13-18.

Giving continued vitality to their treaty hunting right, even after the effective date of a statutory termination proclamation, is not inconsistent with the responsibilities of Menominee Indians as citizens or with their general amenability to State law. Indeed, this Court and lower Federal courts repeatedly have ruled that Indians may exercise special treaty hunting and fishing rights off their reservations where they otherwise are completely subject to State jurisdiction. *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *United States v. Winans, supra*; *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F. 2d 1013 (9th Cir. 1967); *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F. 2d 169 (9th Cir. 1963). Moreover, in authorizing the extension of

State civil and criminal jurisdiction upon Indian reservations as part of an overall policy to bring all citizens under the same laws, Congress still expressly excluded from coverage every right, privilege and immunity afforded under Federal treaty to any Indian or Indian tribe "with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." Act of August 15, 1953 (Public Law 280), 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360; see *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 56-57 (1962). In short, like the oil operator, the farmer or the small businessman, Indians can be full citizens and yet enjoy rights not shared by their fellow citizens.

Giving continued vitality to the Menominees' reservation hunting right under the 1854 Treaty also will not interfere with operation of a sound State conservation program. When the issues in this case were before the Wisconsin courts, Judge Fischer of the Shawano-Menominee County Court found that tribal members engaged in hunting primarily to supplement an inadequate diet (Appendix, pp. 47-48), while the State of Wisconsin apparently made no showing that such activities had any material adverse impact upon the supply of game. Significantly, in comparable litigation where the requirements of conservation have been fiercely contested and a detailed factual presentation has been made with respect thereto, the lower Federal courts uniformly have determined that Indian hunting and fishing for subsistence purposes constitute only a minor fraction of the total harvest, and that, if necessary, preservation of these natural resources easily could be accomplished by additional restrictions upon commercial fishermen and/or sportsmen who do not possess treaty rights. *Maison v. Confederated Tribes*



of the Umatilla Indian Reservation, *supra*; *Makah Indian Tribe v. Schoettler*, 192 F. 2d 224 (9th Cir. 1951); *Confederated Tribes v. Maison*, 262 F. Supp. 871, 872 (D. Ore. 1966), *aff'd*. *Holcomb v. Confederated Tribes, supra*; *Confederated Tribes v. Maison*, 186 F. Supp. 519, 520 (D. Ore. 1960).

Repeals by implication are not favored, and "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 160 (1934); see also *Squire v. Capoeman*, 351 U.S. 1, 10 (1956). The case at bar lacks any justification for retreat from this general rule. The language of the 1954 Menominee Termination Act simply does not provide, and there is no valid basis in its legislative history or in public policy for holding, that the Menominees have lost their treaty right to hunt on the Menominee Reservation without regard to State law.

### CONCLUSION

For the Menominee Indians, the termination of Federal services under the 1954 Act has proved an economic and social disaster. One major disturbing element in the community is the outstanding conflict in judicial rulings which subjects tribal members engaged in subsistence hunting to prosecution by State authorities for exercising a treaty right found by the Court of Claims still to exist. The Menominees both need and want that treaty right, and Congress certainly has not manifested a clear intent to take it away. Accordingly, for the reasons heretofore given, the Association urges this Court to affirm the decision below and at the same time

specifically to reject the contrary holding of the Wisconsin Supreme Court in *State v. Sanapaw, supra.*

Respectfully submitted,

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DEC 27 1967

JOHN F. DAVIS, CLERK

No. 187

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1967**

**MENOMINEE TRIBE OF INDIANS, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF CLAIMS**

**BRIEF FOR THE UNITED STATES**

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**OPINION BELOW**

The opinion of the Court of Claims (App. 5-30) has not yet been reported.

**JURISDICTION**

The jurisdiction of the Court of Claims was asserted to rest on 28 U.S.C. 1491 and 1505 (App. 1). The judgment of the Court of Claims was entered on April 14, 1967 (App. 5). The petition for a writ of certiorari was filed May 22, 1967, and was granted October 9, 1967. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

**TREATY AND STATUTE INVOLVED**

The relevant portions of the Treaty of May 12, 1854, 10 Stat. 1064, and of the Menominee Termination

Act of 1954, 68 Stat. 250, as amended, 25 U.S.C. 891-902, are printed in the record appendix (App. 31-35).

#### QUESTION PRESENTED

Whether the Menominee Termination Act—which ended federal guardianship over the Tribe and subjected its reservation to State jurisdiction—had the effect of abrogating hunting and fishing rights allegedly conferred by federal treaty so as to render the United States accountable in damages.

#### STATEMENT

In the judgment under review, the Court of Claims dismissed a complaint by the Menominee Tribe of Indians seeking to recover compensation for the alleged taking of hunting and fishing rights (App. 1-4). These rights were claimed under the Treaty of Wolf River of 1854, which set aside substantial acreage as a "permanent home" for the Menominees, with the stipulation that the reservation was "to be held as Indian lands are held" (App. 32). The taking was alleged to have occurred as a consequence of a "Termination Act" enacted by Congress in 1954, 68 Stat. 250, 25 U.S.C. 891-902 (App. 33-35).

The Act provided for the transfer to a tribal corporation of all property held in trust for the Menominees by the United States, pursuant to a plan to be submitted by the Tribe and approved by the Secretary of the Interior. 25 U.S.C. 896-897 (App. 34-35). That transfer became effective on April 29, 1961. 26 Fed. Reg. 3726. Thereafter, according to the Termination Act (25 U.S.C. 899, App. 35)—

\* \* \* individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. \* \* \*

Subsequent to termination, three Menominee Indians were charged with violation of Wisconsin game laws by hunting deer with an artificial light and transporting a loaded and uncased gun in an automobile. The trial court found the defendants not guilty on the ground that the State of Wisconsin lacked jurisdiction to regulate hunting and fishing within the former Menominee Reservation, now Menominee County (App. 36-50). The Supreme Court of Wisconsin reversed, one judge dissenting. *State v. Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41. It held that the Termination Act abrogated any right to be free of State game laws in exercising hunting and fishing rights over the former reservation (App. 61). This Court denied certiorari, 377 U.S. 991.

This suit followed. As already noted, the Court of Claims dismissed the petition upon motion of the United States for summary judgment (App. 5-30). It held that the Treaty of 1854 granted the Menominees "an unqualified right to hunt and fish on the reservation in their own way free from all outside regulation or control" (App. 10) and that this right sur-

vived termination of federal guardianship (App. 12-18). Accordingly, the court concluded that the United States had taken nothing and owed no compensation (App. 25-26).

## ARGUMENT

### INTRODUCTION AND SUMMARY

#### I

The posture of this case is unusual. Although the Menominees sued the United States for monetary damages on the theory that valuable hunting and fishing rights had been taken from them by congressional action, and alternatively so argue here, they now primarily urge the Court to affirm the judgment dismissing their claim on the ground that their rights survive unimpaired. And the United States, the only respondent, of course agrees that it owes nothing. Thus, except for the State of Wisconsin which appears as *amicus curiae* and has doubtful standing to interpose its views on the liability of the United States toward its former wards, there is little dispute as to the correctness of the judgment entered by the Court of Claims. In this situation, this Court may dispose of the case on the limited ground that no monetary award is due, the only question on which the ruling under review is authoritative.

#### II

The court below did not, however, merely rule that the United States was not liable in damages. Expressly disagreeing with the Wisconsin Supreme Court's decision in *State v. Senapaw*, 21 Wis. 2d 377,

124 N.W. 2d 41, certiorari denied, 377 U.S. 971, the Court of Claims held that the Menominees "own and possess at the present time the exclusive right to hunt and fish on their reservation free of restriction, regulation, or control by the State of Wisconsin" (App. 26). We speak to that question on the supposition that this Court may deem it appropriate to resolve the fundamental conflict of views between the two courts. In this aspect, the decision turns on the proper construction of a federal treaty and a federal statute and implicates the obligation of the government to keep its promises toward a once dependent people.

The initial question is whether the treaty of Wolf River, stipulating that the ceded acreage was "to be held as Indian lands are held," meant to grant the Menominees a special interest in the wildlife resource of their reservation. The three courts which have considered the matter, together with the petitioner and the State of Wisconsin, have all agreed on an affirmative answer. The next question is the effect of the 1954 Termination Act on the rights conferred by the treaty, whatever their scope—the petitioner invoking the holding of the Court of Claims that they survive unimpaired, Wisconsin supporting the ruling of the State Supreme Court that they were lost upon termination of federal guardianship. For our part, we believe that the Termination Act should not be construed to abrogate whatever rights were granted by the treaty by permitting the State to treat the fish and game of the Menominee lands as subject to the same plenary power of regulation as applies elsewhere. On the other hand, we do not read the 1854 Treaty as grant-



ing an absolute immunity from all outside regulation of hunting and fishing and accordingly conclude that the State—now standing in the shoes of the United States—may impose limited restrictions if necessary.

A. THE TREATY OF 1854 MAY FAIRLY BE READ AS GRANTING TO THE TRIBE A SPECIAL PROPERTY INTEREST IN THE WILDLIFE OF THE RESERVATION, BUT NOT AN ABSOLUTE IMMUNITY FROM GOVERNMENTAL REGULATION OF HUNTING AND FISHING

Undoubtedly, in 1854, and for more than a century thereafter, the Menominee Indians were in fact free to hunt and fish as they pleased on their lands. Did that situation prevail only because the status of the Menominee Reservation as a sort of federal "enclave" was viewed as ousting State game laws and because the national authorities—although they had power to do so—did not attempt to regulate hunting and fishing within the area? Or did this uninhibited freedom of the Tribe with respect to hunting and fishing stand on a less precarious footing, the Treaty of Wolf River? That question is relevant since no one suggests that compensation would be due if the Indians' practical immunity from State game laws was a mere consequence of the federal "fence" around their reservation, which has now been removed.

The Treaty of 1854 ceded to the Menominees "as a permanent home" certain acreage "to be held as Indian lands are held," without further specification of the title intended or the appurtenant rights conveyed. That general language has been characterized as an attempt to "dodge the problem of defining the Indian estate" created. *Federal Indian Law* (1958),

p. 606. But whether they connote fee simple title or a lesser possessory estate, it seems clear that these words are a form of short-hand for that bundle of rights which had theretofore been commonly included in land transfers to Indian tribes. Thus, the failure to isolate hunting and fishing rights is not dispositive. On the contrary, the reference to the conditions under which "Indians lands are held" may well have intended to sum up in a single phrase the familiar provisions of earlier treaties which often included a prominent mention of hunting and fishing.<sup>1</sup>

At all events, it is unlikely that a grant of land to Indians a century ago would not have taken into account the fact that hunting and fishing was a well-known incident of Indian land tenure. Such a premise is all the more difficult in this instance. Indeed, hunting and fishing was (and still is) a most important aspect of the Menominee way of life (App. 10-11,

<sup>1</sup> See, e.g., Treaty of January 3, 1786, with the Choctaw Nation, Art. 3, 7 Stat. 21, 22 ("lands allotted \* \* \* to live and hunt on \* \* \*"); Treaty of January 31, 1786, with the Shawanee Nation, Art. 6, 7 Stat. 26, 27 ("lands \* \* \* to live and hunt on \* \* \*"); Treaty of January 9, 1789, with the Wyandot, etc., Art. 3, 7 Stat. 28, 29 ("to live and hunt upon, and otherwise to occupy as they shall see fit"); Treaty of August 3, 1795, with the Wyandots, etc., Art. 5, 7 Stat. 49, 52 ("The Indian tribes \* \* \* are quietly to enjoy [the lands], hunting, planting, and dwelling thereon so long as they please \* \* \*"); Treaty of November 10, 1808, with the Osages, Art. 8, 7 Stat. 107, 109 ("to live and to hunt, without molestation, \* \* \*"); Treaty of August 24, 1835, with the Comanche, etc., Art. 4, 7 Stat. 474, 475 ("free permission to hunt and trap"); Treaty of September 30, 1854, with the Chippewa, Art. 2, 10 Stat. 1109, 1110 ("for a fishing ground"); Treaty of June 11, 1855, with the Nez Percés, Art. 3, 12 Stat. 957, 958 (the "exclusive right of taking fish \* \* \*").

43-44, 47-48, 55-56), and the reservation lands involved here were selected precisely because of their abundance of game. Accordingly, it seems a fair construction of the present grant that it meant to give assurance that the tribe would have not only the land itself but the right to hunt and fish within the reservation in their accustomed way.

It does not necessarily follow, however, that any immunity from outside regulation granted by the Treaty of 1854 must be held absolute. Thus, we think it clear that the United States, while it had jurisdiction over the reservation lands, could regulate hunting and fishing to the extent necessary to preserve the asset for the Tribe as a whole. So, also, we believe the government might have taken measures, if any were needed, to assure that the Indians did not unfairly deprive the other inhabitants of the country with respect to migratory birds or fish which passed through their lands. In short, the right involved is, in our view, akin to the privilege to hunt and fish at "usual and accustomed places" off the reservation conferred by many treaties—which, although superior to private rights and immune from some governmental interference, must yield to necessary regulation. See *e.g.*, *Ward v. Race Horse*, 163 U.S. 504; *United States v. Winans*, 198 U.S. 371; *Seufert Bros. Co. v. United States*, 249 U.S. 194; *Tulee v. Washington*, 315 U.S. 681. Of course, here, the right is exclusive, and the Tribe accordingly cannot be required to allow strangers onto its lands nor otherwise be compelled to share with others the wildlife resource found on

the reservation. But, in both situations, when the general public interest in conservation is shown to be imperiled if the Indians also are not brought under a particular generally applicable restriction, their special right to hunt and fish does not prevent it.

We conclude that the Court of Claims—like the Wisconsin courts in *Sanapaw*—went too far in construing the Treaty of Wolf River as conferring upon the Menominees an absolutely unrestrained right to hunt and fish, good against *all* outside regulation except only an exercise of the power of eminent domain. Even in 1854, we suppose, the concept of Indian reservations as quasi-sovereign “nations,” beyond the reach of the white man’s law, was already yielding to the more modern reality. See *Kake Village v. Egan*, 369 U.S. 60, 71–75. But, at all events, we do not believe the general terms of the Treaty need be read as creating an impenetrable “hunting ground” for all time. Thus, we think it plain that the kind of safety regulation involved in the *Sanapaw* case—a prohibition against transporting a loaded and uncased gun in an automobile—does not infringe the treaty right of the Menominees. So, also, the restriction against hunting deer with the aid of an artificial light is a probably necessary measure which does not overstep the line. It may be doubted whether the Treaty of Wolf River, however generously construed, can be read to insulate such modern practices, so distantly related to the Menominee way of life of 1854.

The grant to the Indians was clearly not a grant of sovereignty. Whatever rights it gave, it did not

wholly eliminate the exercise of governmental power. The Menominees cannot rightly complain if appropriate restrictions—such as might have been applied by the United States before termination—are now made applicable to them in the overall public interest.

B. THE TERMINATION ACT DID NOT DEPRIVE THE MENOMINEES OF ANY PROPERTY RIGHT CONFERRED BY TREATY

Assuming the Treaty of Wolf River conferred on the Menominees a special right to hunt and fish on the ceded lands, we agree with petitioners that the Termination Act of 1954 did not affect it. To be sure, although the suggestion was made, Congress did not expressly exempt hunting and fishing rights from the provision that, after effective termination, "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction" (see 25 U.S.C. 899, App. 35). But several considerations indicate that there was no intent to abrogate treaty rights, to the extent that the Indians held such rights.

First, while power to do so undoubtedly exists (*Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-567), it is not lightly to be assumed that Congress intended to deny any right which may have been given to the Indians a century earlier. At least, that conclusion should be avoided in the absence of express language or some other unmistakable sign of intent. Cf. *Squire v. Capoeman*, 351 U.S. 1. Moreover, the suggestion that any rights that may find their support in the treaty were meant to be left unprotected against hostile State



laws is wholly at odds with contemporaneous congressional policy. Other enactments of the same Congress, the Termination Act applicable to the Klamath Reservation and Public Law 280 opening up other Indian reservations to State law, make clear that hunting and fishing rights guaranteed by treaty were not to be sacrificed. See 25 U.S.C. 564m(b); 18 U.S.C. 1162(b).

No doubt, it is arguable that the absence of a like saving proviso in the Menominee Termination Act reveals a contrary intent here. But, as this Court observed, rejecting a comparable contention in *Metlakatla Indians v. Egan*, 369 U.S. 45, 57; "It would be sheer speculation to attribute significance to the imperfect parallelism \* \* \*. The process of statutory drafting and evolution, here veiled from scrutiny, is too imprecise to permit such an inference." We think it more likely that Congress accepted the authoritative advice of Interior Department officials that treaty rights would survive the Termination Act even if it did not expressly mention them (see App. 13, 57-59; see, also, App. 21). Indeed, the statutory mandate directing that the termination plan should "contain provision for protection of \* \* \* fish and wildlife" (25 U.S.C. 896, App. 34) suggests an understanding that these matters would not be fully regulated for the former reservation lands by State conservation laws.

Finally, and of great importance we believe, it is not likely that the Congress would knowingly expose the United States to a claim for compensation by destroying property rights conferred by treaty—especially

while it was purporting to sever the government's financial obligation toward the Indians.

C. THE UNITED STATES IS NOT LIABLE FOR STATE-IMPOSED RESTRICTIONS ON HUNTING AND FISHING WHICH DO NOT IMPAIR PROPERTY RIGHTS CONFERRED BY TREATY

For the reasons just stated, we contend that the Court of Claims was correct in holding that whatever property right in the wildlife of the reservation may have been secured to the Tribe in 1854 survived the Termination Act of 1954 and its implementation in 1961. Since petitioners agree that on this hypothesis—which they urge upon this Court—the United States owes them nothing, we might stop here. However—unlike petitioners and the court below—our conclusion that the treaty rights of the Menominees remain unimpaired does not lead us to say that they necessarily enjoy today the same uninhibited freedom to hunt and fish as they did a century ago, or that they are now entitled to follow all of the practices that they were utilizing in 1961. Since any difference may be attributable, at least indirectly, to the Termination Act, the question may arise whether the United States is accountable in damages for this result.

As we have suggested, the substitution of State jurisdiction over the reservation lands for the former federal supervision may have important practical consequences—because, unlike the federal authorities who did not exercise their power to regulate, the local government apparently intends to use its prerogatives. We assume, of course, that the State can restrict hunting and fishing on the Menominee lands to no greater

extent than the national government might have, consistently with the Treaty of Wolf River. But, as we have said, the rights granted by the treaty, whatever their scope, never precluded a degree of outside regulation of hunting and fishing for limited purposes. And it is that power of regulation, unused in federal lands, that has now been transferred to the State. Plainly, the mere transfer of jurisdiction works no "taking" or other legal injury, even if the transferee proposes to use it differently. So long as the treaty right is respected, there can be no legitimate cause for complaint if Wisconsin chooses to hem it in as closely as possible without invading it. Of course, the United States is not responsible if the State oversteps the line; but other remedies are available to prevent it. Cf. *Puyallup Tribe v. Department of Game*, No. 247, *Kautz v. Department of Game*, No. 319, O.T., 1967, certiorari granted December 18, 1967.

#### CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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DECEMBER 1967.

DEC 26 1967

JOHN F. DAVIS, CLERK

In the  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1967

No. 187

MENOMINEE TRIBE OF INDIANS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS

**BRIEF OF THE NATIONAL CONGRESS  
OF AMERICAN INDIANS,  
AMICUS CURIAE**

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In the  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1967

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No. 187

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MENOMINEE TRIBE OF INDIANS,  
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UNITED STATES COURT OF CLAIMS

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BRIEF OF THE NATIONAL CONGRESS  
OF AMERICAN INDIANS,  
AMICUS CURIAE

---

Pursuant to Rule 42(2), the parties have consented in writing to the filing of a brief amicus curiae by the National Congress of American Indians.

The National Congress of American Indians, Inc. (NCAI) is a non-profit association of 87 Indian tribes. Its purpose is to promote the interests of American Indians. It was incorporated in Oklahoma in 1954. Its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

NCAI supports the decision of the Court of Claims, to wit, that the Menominee Tribe's hunting and fishing rights were not abrogated by Menominee Termination Act of 1954.

NCAI is much concerned with this case because it involves hunting and fishing rights, which are one of the most important issues to Indian tribes today. These rights are under attack in the Northwest states<sup>1</sup> and in Oklahoma, Michigan, Wisconsin, and elsewhere, as the urban areas expand and approach the rural Indian communities, and as the demand increases for the diminishing supply of inland fish and game.

The usual reason given by the State authorities whenever they seek to impose State fish and game regulations on the Indians, is that it is necessary for conservation. Conservation is a noble and practical goal which even the Indians agree with as a general principle. There are, it is true, a few isolated examples of excessive Indian fishing<sup>2</sup> (curiously, we know of none of excessive Indian hunting), which may endanger the entire fishery in a given stream, but these are relatively rare exceptions. As a rule, Indian hunting and fishing are carried out on such a minor scale as to pose no genuine threat to conservation.<sup>3</sup> Indeed, a growing num-

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<sup>1</sup> See *Puyallup Tribe v. Dept. of Fisheries*, No. 247, O.T. 1967, certiorari granted December 15, 1967. This case involves the right of Washington to regulate certain off-reservation treaty fishing rights.

<sup>2</sup> In 1964, hearings were held before Congress on a bill to authorize the States to regulate Indian hunting and fishing. The States, and the sports, commercial and Indian interests were represented, and some (but not complete) statistics were given. See *Hearings on S.J. Res. 170 and 171 before Subcommittee on Indian Affairs, Senate Interior and Insular Affairs*, 88th Cong. 2d Sess. (August 5 and 6, 1964).

<sup>3</sup> See note 32 of Petitioner's brief. See also the charts at pp. 55-58 of the *Hearings* cited in note 2 above; also pp. 100, 131-133 (note that these tables do not include the sports catches), 149, 229-230. These do not add up to complete data by any means, but do give some indications. A letter to the editor appearing in the Washing-

ber of tribes have their own conservation regulations, which they enforce against their own members.<sup>4</sup>

Except in the unusual cases of over-fishing, the real reason for the attacks on Indian hunting and fishing seems to be simple jealousy that the Indians have preferred rights arising from their treaties, customs or ownership of reservations. Nothing seems to outrage sportsmen more than the knowledge that a few Indians hunt and fish under more liberal rules than they do, and typically, the State fish and game departments are entirely oriented toward the sportsmen,<sup>5</sup> without any regard for the Indian interests and rights.<sup>6</sup>

Some State hunting and fishing rules do not even pretend to be based on conservation, but rather on the white man's concept of good sportsmanship, such as the rules against shooting birds with rifles, or (as in this case) against jack-lighting deer.

When an Indian is hunting elk, or deer, or fishing for salmon, he is not acting for sport, but for subsistence. He bitterly resents being told he must follow the rules made by a white and affluent society for its own recreation without

ton Post, November 22, 1965, by an American Friends Service Committee observer, cited figures to show that commercial fishermen took 83% of the overall Washington catch, sportsmen 14%, and Indians 3%. He said that the Nisqually Tribe's entire catch was only about three times that fed to Namu, the pet whale of the city of Seattle.

<sup>4</sup>See the Yakima regulations, *Hearings* pp. 59-61; the Puyallup regulations, id. pp. 101-103; the Quinault regulations, id. pp. 140-144; the Tulalip (Snohomish) regulations, id. pp. 154-158.

<sup>5</sup>In many States the sports fisheries are regulated by a different department than the commercial fisheries, and statistics and personnel are separate. See *Hearings*, id. pp. 123, 130.

<sup>6</sup>Petitioner's brief, note 32, makes the point well, when it cites the three *Maison* cases.

any consultation with or consideration for his needs and traditions and treaties. If his tribe has a treaty with the United States, he feels that the Government is supposed to protect his way of life, and when the State attempts to interfere with something as personally important to him, and so much a part of his ancestral heritage as hunting and fishing, he feels that the treaty is being dishonored, and he feels strongly about it. Some Indians have felt strongly enough about it to resort to force and arms to protect what they believe are their rights.<sup>7</sup>

The other aspect of this case which concerns NCAI is the fact that the attack on the Menominees' hunting and fishing rights occurs in the context of termination of federal supervision. With few exceptions the Indian tribes of America have bitterly opposed the termination of federal supervision because, with few exceptions, they have not yet reached a stage of economic development and individual education that would enable them to make their own way without federal assistance. The Menominee Tribe is a good example of a prematurely "emancipated" tribe. Its members are in worse condition than before termination.<sup>8</sup> Hunting and fishing to them is important for subsistence.

Most Indian tribes recognize that their goal must be to lift themselves to a position where they can prosper or at least survive comfortably without federal subsidy. But this will take time, and premature termination may only cruelly set back whatever progress a tribe has made.

<sup>7</sup>One episode involved the Nisquallies, see Aberdeen (Wash.) Daily World, October 9, 13, 19, 20, 1965, and Washington Post, October 28, 1965. Another involved the Yakimas, see Portland Oregonian, April 26, 1966 (front page headline), and Washington Post, April 26, 1966, p. A-10.

<sup>8</sup>See citations at note 15 of Petitioner's brief.

We realize that the wisdom of terminating federal assistance to the Menominee Tribe cannot be argued here. The deed is done. However, whether termination also destroyed the Menominees' hunting and fishing rights, rights so important to them as to Indians generally, is open to argument. We submit that there was no *need* to destroy those rights, nor any *intent* to do so, and so the failure to expressly abrogate them, in light of the rule that statutes are usually construed favorably to Indians,<sup>9</sup> means that they still exist.

Respectfully submitted,

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<sup>9</sup>*Squire v. Capoeman*, 351 U.S. 1 (1956); *Worcester v. Georgia*, 6 Pet. 515, 582 (1832).



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

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No. 187

MENOMINEE TRIBE OF INDIANS,  
*Petitioner,*  
v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Writ of Certiorari to  
the United States Court of Claims

---

**REPLY BRIEF FOR PETITIONER**

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The Government agrees (p. 8) that the Treaty meant to assure the Indians that they could hunt and fish within the reservation in their accustomed way. But, says the Government, the Indians' rights are like off-reservation treaty fishing rights, which are subject to some State regulation. The Government, cites *Race Horse*, *Winans*, *Seufert*, and *Tulee*, but only the latter is really in point.

We maintain that the Menominee hunting and fishing rights within the former reservation are not subject to any regulation at all by the state or federal governments. The predominant aspect of off-reservation rights is that both Indians and non-Indians are sharing the same game or fish resource, and the problem is how to effectuate the

treaty so as to give the Indians something more than they already have as ordinary citizens, without endangering the resource which both Indians and non-Indians are entitled to exploit.

The problem of sharing has little or no importance in this case, because the Indians still own the entire reservation, and they need not, and do not, share their hunting and fishing on the reservation with non-Indians. Perhaps to some extent the roaming-zone of the fish or game on the reservation may extend outside the reservation, and where it does, non-Indians would have a legitimate interest in conservation.<sup>1</sup>

But if we are wrong, and if rights within the former reservation are considered the same as off-reservation treaty fishing rights, then the correct rule is as laid down by this Court in *Tulee*<sup>2</sup> and interpreted by the Ninth Circuit.<sup>3</sup> The *Tulee* case holds that off-reservation treaty fishing (and presumably hunting) rights are subject to such State regulations "as are necessary for the conservation of fish . . . ." <sup>4</sup> The Ninth Circuit construes "necessary" to mean just that, and that means that Indian fishing can be curtailed only if curtailment of non-Indian fishing is not enough to achieve proper conservation.<sup>5</sup>

The Government (p. 9) characterizes the State rule against transporting a loaded and uncased gun in an auto-

<sup>1</sup> We would concede, as the Government suggests (p. 8), that the Indians' right to hunt or fish should not be so absolute as to allow total depletion of a game or fish resource which extends outside the reservation.

<sup>2</sup> 315 U.S. 681 (1942).

<sup>3</sup> *Holcomb v. Confederated Tribes*, 382 F.2d 1013 (9th Cir. 1967). See full treatment in note 31 of our main brief.

<sup>4</sup> 315 U.S. at 684.

<sup>5</sup> *Holcomb*, above; *Maison v. Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963), cert. den., 375 U.S. 829; *Makah Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

mobile as a "safety regulation." We think the purpose of this rule is sportsmanship rather than safety or conservation. The rule appears in Section 10.07(3) of the Wisconsin Administrative Code, entitled "Hunting, prohibited methods," which subsection also forbids shooting from autos, use of nets or snares; possessing firearms while shining deer, etc. These are not safety regulations.<sup>6</sup> We think the same is true of the rule against hunting deer with an artificial light. For non-Indians, this is unsportsmanlike,<sup>7</sup> but for an Indian it may be the only way he can catch enough deer to last him over the winter.

Respectfully submitted,

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January 15, 1968

<sup>6</sup> See other State regulations cited in our main brief, note 16.

<sup>7</sup> This is not a "necessary" conservation measure as the Government indicates (p. 9), because so far as non-Indians are concerned, the bag limit of one deer a day completely assures conservation, leaving no need for such additional conservation, if any, as might be provided by a rule against "shining" deer.

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**/ In the**  
**SUPREME COURT of the UNITED STATES**

**October Term, 1967**

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**No. 187**

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**THE MENOMINEE TRIBE OF  
INDIANS, et al.**

**v.**

**THE UNITED STATES**

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**BRIEF OF THE STATE  
OF WISCONSIN, AMICUS CURIAE  
ON RE-ARGUMENT**

---

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In the  
**SUPREME COURT of the UNITED STATES**

October Term, 1967

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**No. 187**

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**THE MENOMINEE TRIBE OF  
INDIANS, et al.**

*v.*

**THE UNITED STATES**

---

**BRIEF OF THE STATE  
OF WISCONSIN, AMICUS CURIAE  
ON RE-ARGUMENT**

---

**INTEREST OF THE AMICUS CURIAE**

The decision of the Court of Claims is in direct opposition to the holding of the Wisconsin Supreme Court in *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 124 N. W. (2d) 41, cert. den. 377 U. S. 991. In that case it was held that the exclusive hunting and fishing rights granted to the Menominee Indians by the Wolf River Treaty of 1854 (10 Stat. 1064) were abrogated by the so-called "Termination Act" (25 U. S. C. secs. 891-902).

The Menominees commenced an action in the United States Court of Claims to recover compensation from the federal government for the taking of these rights. In grant-

ing the government's motion for summary judgment and dismissing the petition, the court held that the treaty rights referred to above were not abrogated by the Termination Act. In the course of its opinion, the court intimated that if these rights have been interfered with, it is due to the action of the State of Wisconsin acting through its supreme court and law enforcement officials. As a result of this opinion, and its threat of liability, the State of Wisconsin has a keen interest in the resolution of the issues before this court, and disagrees wholeheartedly with the lower court's opinion in this respect. The Wisconsin Supreme Court, following the mandate of a federal law which, we submit, is clear in its abrogation of Menominee hunting and fishing rights, cannot in any way subject the state to liability.

In the proceedings before the Court of Claims, the petitioners' contention was that the Termination Act abrogated and abolished the special hunting and fishing rights granted to the Menominee Tribe by the 1854 Treaty of Wolf River. *Menominee Tribe of Indians* (1967), 179 Ct. Cl. 496, 499-500. In the proceedings before this court on certiorari, the petitioners have reversed their position and now contend that the Act did not abolish these rights. The United States has undergone a similar reversal, for in *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 124 N. W. (2d) 41, cert. den. 377 U. S. 991, the Solicitor General argued to this court that the effect of the Termination Act was to "terminate the reservation status of the Menominee lands and to subject hunting rights on those lands to \* \* \* state regulation." *State v. Sanapaw, supra*, Memorandum for the United States on Petition for Writ of Certiorari, No. 930, O. T., 1963, p. 2.

The State of Wisconsin filed a brief *amicus curiae*, and, being unaware of the petitioners' reversal of their position, did not include any discussion on what we feel to be highly important aspects of this case, bearing directly upon the sovereignty of the State of Wisconsin and its ability to apply and enforce its conservation laws in one of its 72 duly organized counties.

On January 29, 1968, the court ordered rebriefing and reargument of the cause, and invited the State of Wisconsin to participate.

It is our conviction that the treaty rights of the Menominees were indeed cut off by Congress and that the United States is fully and solely liable therefor.

### SUMMARY OF ARGUMENT

The Wolf River Treaty of 1854 granted to the Menominees an unqualified right to hunt and fish their lands, free from all outside regulation. Thus, these rights are not derived from aboriginal user, but from a formal treaty with the United States.

Congress has always had plenary power to deal with Indians, and may pass laws in conflict with treaties made with Indians. Thus, Congress has the power to abrogate Indian privileges and rights, including treaty rights, by statute.

For over one hundred years prior to termination, the Menominee tribal government constituted the political organization of, and together with the United States provided governmental services to the Menominee people. The land was held by the government, and the government supervised virtually all aspects of reservation life.



The Menominee "Termination Act," Public Law 399, 83rd Congress, terminates federal trusteeship over the Menominee Indians and their lands, which formerly comprised the Menominee Indian Reservation. The Act also provides that the laws of the several states are applicable to the Menominee Indians in the same manner that such laws are applicable to other citizens within the states. The Act contains no reservation of hunting and fishing rights or privileges in favor of the Indians.

The stated purpose of the Termination Act was to subject the Menominees to the same laws, privileges and responsibilities as are applicable to all other citizens. The legislative history shows that Congress was advised that the language of the Act would extinguish the hunting and fishing rights, yet Congress made no express provision reserving such rights, even though it had before it another version of the bill which specifically would have reserved them.

The termination plan adopted by the Secretary of the Interior pursuant to the act transferred all tribal assets, including title to the reservation lands, to a private corporation in which enrolled members of the tribe were shareholders.

The Wisconsin legislature took all steps necessary to duly organize the reservation lands into a county, and set up the machinery for the usual governmental services and functions.

The net result of the Act, the plan, and its implementation, was to dissolve the tribe and the reservation, and to extinguish the treaty hunting and fishing rights. The

Klamath Termination Act, and the cases decided thereunder, are consistent with this view.

The contemporaneous enactment of Public Law 280 does not indicate any legislative intent to preserve hunting and fishing rights under the Termination Act. Nor does the reference to Public Law 280 in the Termination Plan lead to any similar inference. Rather, it leads to the inference that Congress intended that state law regarding the management of fish and wildlife was to apply to the new county in the same manner that state law regarding the maintenance of law and order was to apply.

Affirmance of the decision below, without clarification, will leave the State of Wisconsin in an impossible situation insofar as implementation of its conservation management and enforcement programs in Menominee County is concerned.

The abrogation of exclusive hunting and fishing rights under the Termination Act constitutes a loss of valuable property rights, and is compensable by the federal government.

## ARGUMENT

### I. PRIOR TO TERMINATION, THE MENOMINEE TRIBE WAS POSSESSED OF THE EXCLUSIVE AND UNRESTRICTED RIGHT TO HUNT, FISH AND TRAP THE RESERVATION LANDS FREE FROM STATE REGULATION.

Between 1817 and 1854 the United States and the Menominee Tribe executed six treaties dealing with land cessions and territorial grants. On May 12, 1854, the government and the tribe signed the document known as the Treaty of Wolf River, which created the Menominee Indian Reservation through a cession of certain lands to the Menominees "to be held as Indian lands are held." 10 Stat. 1064. Both the Wisconsin Supreme Court, and the United States Court of Claims in the decision now under review, have held that the language of the 1854 treaty granted to the Menominees an unqualified right to hunt and fish their lands free from all outside regulation and control. *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 383, 124 N. W. (2d) 41; *Menominee Tribe of Indians* (1967), 179 Ct. Cl. 496; *Menominee Tribe of Indians* (1941), 95 Ct. Cl. 232, 240-241. See also *Moore v. United States* (9th Circ. 1946), 157 F. (2d) 760, cert. den., 330 U. S. 827. The rule of construction to be followed in interpreting Indian treaties is that in case of ambiguity they are to be interpreted in favor of the Indians. This was the holding in *Winters v. United States* (1908), 207 U. S. 564, 576, 28 Sup. Ct. 207, 52 L. Ed. 340, wherein this court declared:

"By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine be-

tween two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

It is unlikely that the Menominees would have knowingly relinquished the special fishing and hunting rights which they enjoyed on their own lands, and accepted in exchange other lands to which such rights did not extend. They undoubtedly believed that these rights were guaranteed when other lands were ceded to them "to be held as Indian lands are held."

Thus, the rights of the Menominees in this respect do not derive from aboriginal user, but from a formal treaty with the United States government.

## II. CONGRESS HAS PLENARY POWER TO DEAL WITH INDIANS, AND MAY BY STATUTE ABROGATE INDIAN RIGHTS AND PRIVILEGES, INCLUDING THOSE SECURED BY TREATY.

Congress has plenary power to deal with Indians and may abrogate Indian privileges and rights, including treaty rights, by statute. *Super et al. v. Work* (CCA, D. C., 1925), 3 F. (2d) 90, affirmed per curiam, 271 U. S. 643. The power of Congress over Indian tribes and tribal property cannot be limited by treaty so as to bar repeal or amendment by later statute. *Ward v. Race Horse* (1896), 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244; *Lone Wolf v. Hitchcock* (1903), 187 U. S. 553, 565-567, 23 S. Ct. 216, 47 L. Ed. 299; *United States v. Waller* (1917), 243 U. S. 452, 37 S. Ct. 430, 61 L. Ed. 843; *Anderson v. Gladden* (CCA 9th, 1961), 293 F. (2d) 463, Cert. denied 368 U. S.

949. See also, *Cain v. First Nat. Bank of Oregon* (9th Cir. 1963), 324 F. (2d) 532.

The extent to which tribal Indians should be emancipated from their status as wards of the Federal Government is a matter which rests entirely within the discretion of Congress. *Lone Wolf v. Hitchcock*, *supra*, pp. 565-567; *United States v. Waller*, *supra*, pp. 459-460.

In *Lone Wolf v. Hitchcock*, *supra*, this court stated (187 U. S. at p. 566):

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. \* \* \*"

See also *Chemah v. Fodder* (D. C., W. D. Okla., 1966), 259 F. Supp. 910, 914.

Indian tribes have always been regarded as dependent nations, or quasi-sovereigns, and treaties with them have been looked upon not as contracts, but as public laws which may be abrogated at the will of the United States. *Choate v. Trapp* (1912), 224 U. S. 665, 671, 32 S. Ct. 565, 56 L. Ed. 941; *Sioux Tribe of Indians v. United States* (Ct. Cl., 1956), 146 F. Supp. 229, 236.



Where, as here, treaty provisions operate as domestic legislation, they have no greater legal force or effect than legislative acts, and when a treaty is inconsistent with a subsequent act of congress, the latter prevails under ordinary rules of statutory construction. U. S. Department of the Interior, *Federal Indian Law* (1958), pp. 24-25. See also *Ward v. Race Horse*, *supra*, p. 514.

It is interesting to note that in a treaty executed two years after the Wolf River Treaty the Menominees and the government stipulated as follows:

"1. That if this agreement and the treaties made previously with the Menominees should prove insufficient, from causes which cannot now been (be) foreseen, to effect the said objects, the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of the affairs of the Menomonees as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provision by law, as experience shall prove to be necessary." Treaty of February 11, 1856 (11 Stat. 679).

III. THE PLAIN LANGUAGE AND THE LEGISLATIVE HISTORY OF THE MENOMINEE "TERMINATION ACT" (25 U. S. C. §§ 891-902) INDICATES CLEARLY THAT, BY SO ACTING, CONGRESS EXTINGUISHED THE HUNTING AND FISHING RIGHTS GRANTED TO THE MENOMINEES BY THE WOLF RIVER TREATY.

A. Prior to Termination, the Menominee Tribal government and the federal government provided the political framework of the Menominee Society.

Each Indian Tribe began its relationship with the federal government as a quasi-sovereign, and while subsequent conquest rendered the tribes subject to the legislative power of the United States, it did not extinguish the tribes' internal sovereignty, or their powers of self-government. *Federal Indian Law, supra*, pp. 395-396.

In the case of the Menominees, tribal membership originally depended upon birth or adoption into the tribe, the maintenance of tribal relations, and recognition of membership by the tribe. Eventually, tribal enrollment was governed by the Secretary of the Interior.

For over a hundred years the Menominee people had lived in Wisconsin under uncoded and undefined tribal law supplemented by federal laws and federal agency supervision. Their pattern of life has always been that of a comparatively isolated group in the social, economic and governmental structure of the state and nation.<sup>1</sup>

<sup>1</sup>Wisconsin Legislative Council, 1965 Report, Vol. III, Report of Menominee Indian Study Committee, p. 13.

In 1928 the Menominees adopted a tribal constitution under which the tribe operated until implementation of the Termination Act. The constitution vested governmental authority in a tribal council (a "Town Meeting" form of organization). The reservation was divided into six districts for election of the members of the Advisory Council, which was the executive body. The Advisory Council, chaired by a full-time, salaried official, had authority over most matters of direct importance to the tribe, although the Bureau of Indian Affairs processed most major decisions.<sup>2</sup>

The Advisory Council operated through twelve standing committees: Pension and Relief; Forestry and Mills; Education and Hospital; Law and Order; Fair Association; Agriculture; Recreation; Garment Factory; Land Use; Finance; Governmental Planning and Economic Development.<sup>3</sup>

The general council met in semi-annual and special meetings on call of the Advisory Council, as approved by the Reservation Superintendent, the principal local agent of the Bureau of Indian Affairs.<sup>4</sup>

The Council's role in law enforcement was sizeable and direct—the Law and Order Committee supervised a tribal police department of four full-time policemen, a game warden and part-time assistants.<sup>5</sup>

<sup>2</sup>Robertson, "A Brief Story of the Menominee Indians," *Journal of the Wisconsin Indians Research Institute* (March, 1965), pp.4, 13.

<sup>3</sup>Wisconsin Legislative Council, 1965 Report, *supra*, note 1, p. 59.

<sup>4</sup>Report To The Menominee Indian Study Committee On County And Local Government For The Menominee Indian Reservation, prepared by the Bureau of Government, the University of Wisconsin, Madison, October 1, 1956, p. 13.

<sup>5</sup>*Ibid.*, p. 25.

As with most Indian reservations, the land was free from the property tax. There were some service charges for public utility services, but no property or other local taxes were levied.<sup>6</sup> Prior to termination, reservation homesites were not individually owned.<sup>7</sup>

The Menominee Community, broadly speaking, was an integrated combination of industrial, municipal, and human relations activity—including public health, education, welfare, credit, law and order functions—all of which were sustained or paid for from tribal funds held in trust in the United States Treasury. These funds were subject to use for the above purposes only through appropriation by Congress. Indeed, the federal function was to retain general guardianship of the Menominee people and their property, including general supervision of the area's only industry—the mill and forestry operation.<sup>8</sup>

### B. The 1954 Termination Act: Terms

In 1954 Congress provided for the termination of all federal supervision and control over the Menominee Indian Tribe and the Menominee Indian Reservation by Public Law 399, 83rd Congress, popularly known as the "Termination Act" (68 Stat. 250, as amended, 70 Stat. 544, 70 Stat. 549, 72 Stat. 290, 74 Stat. 867; 25 U. S. C. secs. 891-902). The Act provides, in pertinent part as follows:

"§ 891. The purpose of sections 891-902 of this title is to provide for orderly *termination* of Federal

<sup>6</sup>Wisconsin Legislative Council, 1965 Report, *supra*, Note 1, p. 17.

<sup>7</sup>*Ibid.*, p. 35.

<sup>8</sup>*Ibid.*, p. 13.

supervision over the *property and members* of the Menominee Indian Tribe of Wisconsin. . . .

"§ 893 . . . At midnight of June 17 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment. . . .

\* \* \*

"When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe. § 3, 68 Stat. 250.

"§ 896, . . . The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision.

\* \* \*

"The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to



section 893 of this title, and that it conforms to applicable Federal and State law.

*"The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan.*

"§ 897 . . . On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. . . .

*"The Secretary is authorized, in his discretion, to transfer to the tribe or any member or group of members thereof any federally owned property acquired, withdrawn, or used for the administration of the affairs of the tribe which he deems necessary for Indian use, or to transfer to a public or nonprofit body any such property which he deems necessary for public use and from which members of the tribe will derive benefits.*

"§ 899 . . . When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. *Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all stat-*

*utes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States."* (Emphasis supplied)

In addition, Section 894 of the Act provided for per capita payments to all enrolled members of the tribe.

On April 29, 1961, the Secretary of the Interior, having approved The Termination Plan (which will be discussed below), proclaimed the transfer of title to all tribal trust property as follows (26 Federal Register, No. 82, p. 3726):

*"Pursuant to the authority contained in section 10 of the Act of June 17, 1954 (Public Law, 83-399; 68 Stat. 250), it is hereby proclaimed that the title to all property, real and personal, held in trust by the United States for the Menominee Tribe has been transferred in accordance with section 8 of the Act of June 17, 1954, supra, and that effective midnight April 30, 1961, individual members of the Menominee Tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians; all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Menominee Tribe; and the laws of the several States shall apply to the Menominee Tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*

"As required by section 7 of the Act of June 17, 1954, *supra*, the Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions is published and appears immediately below this notice." (Emphasis supplied)

Upon publication of the plan in the Federal Register in connection with the cited proclamation by the Secretary of the Interior, Ch. 259, Wis. Laws 1959, became effective, and what was formerly the Menominee Indian Reservation became Wisconsin's 72nd county.

### C. The 1954 Termination Act: Legislative History and Purpose.

The policy of termination had its genesis in the 1940's. In 1949, the then Commissioner of Indian Affairs stated that it was not the intention of the federal government to continue in its role as Indian trustee, and that:

"Development of \* \* \* property to full utilization and encouragement of the owner to accept responsibility for management. These are the proper goals of Indian administration. They are the means by which the United States may, within a reasonable time, withdraw entirely from its historic role and turn over its trusteeship to a trained and responsible Indian people."

*Annual report of the Secretary of the Interior, 1949, p. 388.*

Similar manifestations of the government's intent ultimately to transfer Indian Bureau functions to the Indians themselves, or to appropriate state and local agencies, are recounted in *Federal Indian Law, supra*, p. 261.

This court acknowledged the federal policy of "emancipation" in *Williams v. Lee* (1959), 358 U. S. 217, 220-221, 79 S. Ct. 269, 3 L. Ed. (2d) 251, wherein it is stated that:

"Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This contemplates criminal and civil jurisdiction over Indians by any state ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them."

This policy was amply stated by Congress in House Concurrent Resolution 108 which started the process of termination for the Menominees, and which stated, in pertinent part, as follows: (67 Stat. 132, 83rd Cong. 1st Sess.):

"Whereas it is the policy of Congress, as rapidly as possible to make the Indians within ~~the~~ territorial limits of the United States *subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States*, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians within the territorial limits of the United States should *assume their full responsibilities as American citizens*: Now therefore, be it RESOLVED BY THE HOUSE OF REPRESENTATIVES (THE SENATE CONCURRING), That it is declared to be the sense of Congress that, at the earliest possible time, all of the following-named Indian tribes and individual members thereof, should be *freed from Federal supervision and control and from the disabilities and limitations specially applicable to Indians*: \* \* \* The Menominee Tribe of Wisconsin. \* \* \* It is further declared to be the sense of Congress that, up-

on the release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs in the States of California, Florida, New York, and Texas, and all other offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished." (Emphasis supplied)

It became clear at the hearings on H. C. R. 108 that the government was committed to a policy of "extricating itself from Indian Affairs." See *Hearings Before the Subcommittee on Indian Affairs, House Committee on Interior and Insular Affairs*, 83rd Cong., 1st Sess., pp. 4, 7.

A later comment on the policy of termination is found in 38 Oregon L. Rev. 193, 241 (1959):

"In essence, the government, which has maintained the Indians in the status of 'wards' for a century and a half, has finally wearied of its role as guardian and is closing shop on the reservations. \* \* \* The new federal policy is a resumption of pre-New Deal attempts to compel the tribesmen to acculturate themselves to the general American culture. \* \* \*"

The original legislative proposal, which was finally enacted by the 83d Congress in 1954 as the Termination Act, originated in the House of Representatives as H. R. 2828. Two other companion bills to provide for the withdrawal of the Menominee Tribe from federal jurisdiction were also introduced, the one in the Senate being S. 2813, and the one in the House of Representatives being H. R. 7135. Joint hearings on all three bills were held before subcommittees of the Senate Committee on Interior and Insular Affairs and the Committee on Interior and Insular



Affairs of the House of Representatives on March 10, 11, and 12, 1954. Both S. 2813 and H. R. 7135 contained express provisions which preserved any special hunting and fishing rights the Menominees might have by treaty, statute, custom, or judicial decision. H. R. 2828 contained no such corresponding provision.

The court below referred to the testimony of two witnesses appearing before the house committee who expressed their opinion that H. R. 2828's silence on the subject would not affect hunting and fishing rights acquired by treaty, but only those acquired by statute (179 Ct. Cl., at pp. 505-506). It should be noted, however, that neither witness mentioned the provision of H. R. 2828 (now sec. 899 of the Act) stating that: "*the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.) See *Joint Hearings Before the Subcommittee of the Committees on Interior and Insular Affairs*, 83rd Cong., 2nd Sess., on S. 2813, H. R. 2828 and H. R. 7135. (Hereafter referred to as "Joint Hearings.")

It is also a fact, barely alluded to by the court below, that the general counsel for the then Menominee Tribe, Mr. Glen Wilkinson, filed a memorandum with the joint committee, testified at the hearings, and in both his memorandum and testimony specifically disagreed with the two other witnesses, and stated that H. R. 2828 would, by its silence, abrogate Indian hunting and fishing rights.

In his memorandum, Mr. Wilkinson stated in part (Joint Hearings, pp. 697, 704):

"On page 4 (item 7) the statement is made that 'H. R. 2828 contains no provision on this subject. It

does not purport to affect any treaty rights the Indians may have.' Whether it 'purports' to affect such treaty rights seems immaterial; the fact is that it does, at least by implication, abolish the tribal rights to exclusive hunting and fishing privileges within the reservation—rights which were solemnly assured to the tribe in perpetuity."

Mr. Wilkinson testified, in part:

"I just want to comment briefly on a few points included in the Department's report of March 5. As I have already noted, I think they have a good point respecting section 3. On page 4, item 7 of that report, the statement is made that H. R. 2828 contains no provision on this subject. It goes on to say that it does not purport to affect any treaty rights the Indians may have.

"I have already covered this somewhat, but in my judgment I think it is clear that it does affect those treaty rights and that those treaties are abrogated. Certainly it abolishes the tribal right to exclusive hunting and fishing privileges, because automatically upon the final termination date, the Menominee Reservation so far as hunting and fishing is concerned, would become subject to the laws of Wisconsin." (Joint Hearings, p. 708, Emphasis added.)

Thus advised by the General Counsel for the tribe, and with an alternative bill before it which would have expressly reserved hunting and fishing rights (H. R. 7135), Congress enacted the bill which was silent to such rights.

#### **D. Termination—The Plan and the Corporation.**

The Termination Act required the Menominees to prepare a plan for future control of tribal property and service functions—including health, education, welfare, credit, roads, and law and order, and “other matters involved in termination.” 25 U. S. C. § 896. Another portion of § 896 required the plan to “contain provisions for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife.”

The plan as submitted to, and approved by, the Secretary of the Interior, was published in 26 Federal Register, No. 82, p. 3726, and had as its stated objectives: (1) The development of machinery for “municipal activities previously supervised by the Department of the Interior, including health, education, welfare, credit, roads, and law and order;” and (2) the development of a sound economic base through operation of the forest on a sustained yield basis. The heart of the plan is the transfer of all tribal property to a private corporation, Menominee Enterprises, Inc.

In the eyes of the tribe, the subjects of local government and business organization were closely related, for the Menominee people had long been dependent economically upon the forest and lumber mill. As indicated above, the mill operations, like the tribal government and political machinery, had been supervised by the Bureau of Indian Affairs.

In essence, all tribal assets—the forest lands and all the other property of the Menominees—were transferred to the corporation, except for the roads, highways and certain public buildings. The corporation is managed by a

voting trust set up under Wisconsin's general corporation law. The 3,270 Menominees who were enrolled at the time the tribal rolls were closed in 1954 each have a 1/3270th equity in the corporation.

The plan provided that the lands transferred to the corporation could not be alienated for a period of 30 years.<sup>9</sup> The voting trust contemplated by the plan prohibits the trustees from selling the trust stock without approval of the State Conservation Commission and the governor for a period of 30 years. No trust beneficiary could transfer any trust certificates—except to his family or heirs—for five years.<sup>10</sup> After that time, transfer may be made after first offering the certificates to the corporation. All restrictions on alienation expire on January 1, 1981.

A special trust was set up for minor and incompetent enrolled members.

The plan also mentions the desirability of a merit system in government, the transfer of tribal buildings to municipal use, the distribution of state escrow funds to the new county, the improvement and transfer of roads within the reservation to the new county, etc., and states (appendix, p. 6-a):

"It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menominee Reservations having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U. S. C. 1162)."

<sup>9</sup>The restrictions are found in sec. V of the Menominee Common Stock and Voting Trust. See *Federal Register*, Vol. 26, No. 82, April 29, 1961, p. 3726, et seq. Appendix, p. 1-b, et. seq.

<sup>10</sup>This five-year period expired in 1966.

There is no mention of a plan for "fish and wildlife."

Menominee Enterprises, Inc., was incorporated under Wisconsin's general corporation law prior to the Secretary's proclamation. The Articles of Incorporation authorize the corporation to engage in any lawful corporate activity, and, particularly, to manage the business and property transferred to it by the United States. See *Federal Register*, Vol. 26, No. 82, April 29, 1961, p. 3726.

#### E. Termination—State Legislation.

The 1959 Wisconsin Legislature enacted a series of laws in anticipation of termination (Chs. 258, 259 and 260, Laws of 1959). These laws related to the following:

(1) Providing a new method of taxation and regulation of forest lands required by federal law to be operated on a sustained-yield basis;

(2) Creation of a new county to be named "Menominee County," and comprising the lands of the reservation (7 townships in Shawano County and 3 townships in Oconto County);

(3) Attachment of Menominee County to existing Congressional, State Senate and State Assembly districts;

(4) Attachment to Shawano and/or Oconto Counties for the provision of certain political and service functions, such as: county superintendent of schools and school districts; juvenile court; district attorney; divorce counsel; circuit court; county and municipal courts, etc.;



(5) The structure and manner of selecting county and town governing bodies and officers;

(6) Methods of real and personal property valuation, assessment and taxation;

(7) Pro-ration and sharing of expenses of district attorney, county and circuit judges, etc., with Oconto and Shawano Counties;

(8) Distribution of state tax credit funds to Menominee County.

In addition, laws were enacted dealing with land and title records, legal settlement and residence, town taxation, permission to restrict alienation of corporate stock for 5 years, etc. Other pertinent state legislative acts relating to Menominee County are summarized in Appendix C.

#### IV. THE NET RESULT OF THE TERMINATION ACT WAS THE DISSOLUTION OF THE MENOMINEE TRIBE, THE ERADICATION OF THE MENOMINEE RESERVATION, AND CONCOMITANTLY, THE EXTINCTION OF ANY SPECIAL HUNTING AND FISHING RIGHTS GRANTED BY THE WOLF RIVER TREATY OF 1854.

The Treaty from which the Menominees' hunting and fishing rights derive was the document establishing the Menominee Reservation. Through the Termination Act, and the steps taken thereunder, the United States has divested itself of all right, title and interest to the lands which comprise what was formerly the Menominee Indian Reservation, and has ended its trusteeship over the lands. Title to the forest land is now held by Menominee Enterprises, Inc., a private Wisconsin stock corporation. Title

to certain parcels of land has been conveyed by the corporation to individuals for homesites. What was formerly the reservation is now Wisconsin's 72nd county, governed by a Wisconsin County Board and a Town Board. (Wis. Laws, 1959, Ch. 259.) The entire land area is now on the tax rolls. Enrolled members of the Tribe are residents of the town and county, are subject to the State's tax laws, and elect town and county officers (Wis. Laws, 1959, Ch. 259).

Prior to final termination, homesites were not individually owned within the reservation. Between 1961 and 1965, however, 426 homesites and 146 farms averaging over 100 acres each had been conveyed to individual Menominees. See Wisconsin Legislative Council, 1965 Report, Vol. III, p. 35.

Menominee Enterprises, Inc., is indeed the "successor entity to what formerly was the Menominee Tribe. It was recognized as such by the Bureau of Indian Affairs of the United States Department of the Interior in a 1965 report of that agency to the House Committee on Appropriations, wherein it is stated (111 *Congressional Record*, No. 57, p. 6093, March 30, 1965):

"The experience of the Menominees under termination may be examined first of all in terms of *the two entities established by the state law as successors to the Menominee Indian Tribe*. One of these, a State corporation, was Menominee Enterprises, Inc., to which was conveyed all the tribal land which had comprised the reservation \* \* \* the other was a new county, Wisconsin's 72d, carved from the two counties in which the reservation had been located and with borders identical to those of the reservation." (Emphasis added)

A reservation is, after all, "simply a part of the public domain set aside by proper authority for use and occupation by a group of Indians \* \* \* The United States holds the title and the right of use and occupancy is in the Indians." *Federal Indian Law, supra*, p. 20. Similarly, it has been stated that, while neither allotment nor citizenship alone imply a termination of tribal existence, they are factors to be considered—along with the cessation of participation in tribal resources and tribal government. *Federal Indian Law, supra*, p. 465. See also *Healing v. Jones* (D. C., Ariz., 1962), 210 F. Supp. 125, 180, affirmed 373 U. S. 758, 83 S. Ct. 1559, 10 L. Ed. (2d) 703; *Colliflower v. Garland* (9th Circ., 1965), 342 Fed. (2d) 369, 377.

The legislative history of the Termination Act, the plan approved by the Secretary and implemented by the Wisconsin legislature, and the present status of the Menominee people, are wholly inconsistent with any notion that either the Menominee Tribe or the Menominee Indian Reservation has continued in existence. The effect of these actions has been to strip away all vestiges of organized tribal structure, and to make all Wisconsin laws—including the fish and game regulations—applicable to all residents of Menominee County, and enforceable within the county boundaries in the same manner that such laws are applicable to other citizens within the state. Cf. 25 U. S. C. § 899.

The United States, through the Congress and the Department of the Interior, has clearly and unequivocally terminated the tribal existence and reservation status of the Menominees. All tribal property is owned by a private corporation and what was formerly the Menominee Reservation is a duly organized Wisconsin County, with all the

powers, duties and liabilities of a County. By so acting, the Congress of the United States has extinguished the special hunting and fishing rights which accrued to the Menominee Tribe by virtue of the 1854 Treaty.

V. THE COURT OF CLAIMS' CONSTRUCTION OF THE TERMINATION ACT IS CONTRARY TO THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY THEREOF, AND THE CURRENT STATUS OF THE FORMER MENOMINEE TRIBE.

Sec. 891 of the Termination Act provides that its purpose "is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." Sec. 899 of the act provides that upon the Secretary of the Interior's publishing a proclamation in the Federal Register that all tribal property has been transferred in accordance with the act, "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

The italicized statutory language, given its plain and ordinary meaning, would subject the Menominees' pre-existing special hunting rights to the state's game laws. However, the court below felt that the legislative history surrounding the enactment of the Termination Act precludes such an interpretation because it shows that this was not the intent of the Congress.

As indicated earlier in this brief, Congress was advised by the tribal attorneys that passage of H. R. 2828 would "abrogate" the tribal hunting and fishing rights granted therein. Being so advised, and with alternate bills before it which would have expressly reserved hunting and fishing rights to the Menominees (S. 2813 and H. R. 7135), Congress enacted the bill which was silent on this point. It is clear from this, together with the myriad facts of termination discussed above, that Congress knowingly and intentionally chose to extinguish the ~~treaty~~ hunting and fishing rights. The continuation of such rights after termination is inconsistent with not only the plain language of the Act, but also its purpose, effect, and legislative history.

The Court below held otherwise, basing its decision on two facts: (1) The subsequent passage of Public Law 280; and (2) the reference to P. L. 280 in one portion of the Menominees' termination plan.

**A. The enactment of Public Law 280 does not justify the court's interpretation of the Termination Act as preserving the hunting and fishing rights of the Menominees.**

The Termination Act was passed on June 17, 1954 (P. L. 399, 83rd Congress, 68 Stat. 250). A few months later, Congress extended the provisions of P. L. 280 to the Menominee Indian Reservation (P. L. 661, 83rd Congress, 2nd session, August 24, 1954, 68 Stat. 795). Public Law 280, as amended, conferred civil and criminal jurisdiction over the Menominee Indian Reservation upon the state, and *expressly reserved* to the United States jurisdiction



over hunting and fishing, water, and certain property rights. Public Law 280 (18 U. S. C., sec. 1162, 28 U. S. C., sec. 1360), provides in part as follows:

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

\* \* \*

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian of any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof,

\* \* \*

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed op-

posite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

\* \* \*

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance of custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

The Court of Claims, in the decision under review, stated that since the Act was silent on the question of preservation or abrogation of the treaty rights, "\* \* \* we must look to the legislative history of the Act \* \* \* to determine if it cut off these rights by implication." 179 Ct. Cl. at p. 505. After a brief discussion of the two bills pend-

ing before Congress at the time, the Court concluded, (179 Ct. Cl. at p. 507):

"It is logical to assume that the Congress, acting through its committees . . . as well as by its own action as a whole, knew that hunting and fishing rights were being protected in Public Law 280 and there was no need to mention them in the Termination Act."

The court has given no evidence even hinting such a legislative state of mind, and we have been unable to find any such suggestion in the multitude of hearing reports and other documents bearing upon the Termination Act—which is, after all, the legislation being interpreted by the court. The only point made by the documented history of the Act is that Congress had two bills before it—one which would have expressly preserved the hunting and fishing rights, and another which, as they were advised by the attorney for the tribe, would "abrogate" and "abolish" these rights. Congress chose the latter.

It is submitted that the "logical assumption" of the Court of Claims is no more than speculation, and, as such, is insufficient to overcome the plain language of the Act, buttressed by the only documented history of its travel through Congress. The Termination Act clearly fulfilled its stated purpose of making the laws of Wisconsin applicable to the Menominees "in the same manner as they apply to other citizens or persons within \* \* \* (its) \* \* \* jurisdiction." 25 U. S. C. § 899.

B. The Reference to Public Law 280 in one portion of the Termination Plan does not require the construction of the Termination Act adopted by the Court below.

As indicated above, the Termination Act required the Tribe to prepare a plan which, when approved and proclaimed by the Secretary of the Interior, would effectuate the termination. As may be seen from the relevant portion of the Act (25 U. S. C. p. 896, reprinted at pp. 13-14, *Supra*), the pertinent plan requirements were separate. At the beginning of sec. 896 it is stated:

"The tribe shall \* \* \* formulate \* \* \* a plan \* \* \* including services in the fields' of health, education, welfare, credit, roads, and law and order. \* \* \*"

At the end of the section the following appears:

"The plan shall contain provision for protection of the forest on a sustained yield basis and for protection of the water, soil, fish and wildlife."

The court below quoted the requirement of § 896 dealing with a plan for protection of forest, water, soil, fish and wildlife. The court then quoted the following excerpt from the plan (179 Ct. Cl. at p. 508; See Appendix p. 6-a):

"It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menominee Reservation having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U. S. C. 1162)."

From these two items the court concluded that Public Law 280 was made a part of the plan by reference, and

that, as a result, it was unnecessary for Congress to specifically preserve the hunting and fishing rights in the Termination Act. 179 Ct. Cl. at p. 508.

First of all, the plan was prepared by the Menominees themselves, and whatever its terms, it is not part of the legislative history of the Act, nor can it be used, as the Court of Claims appears to have done, to indicate the intent of Congress in passing the Termination Act some seven years earlier.

Secondly, the quoted portion of the plan refers to "law and order"—it does not pertain to protection of fish and wildlife. It is merely the fulfillment of another separate and distinct requirement of the Act. It cannot be said that, by referring to Public Law 280 in connection with a specific requirement dealing with "law and order," the provisions thereof are incorporated into another portion of the plan pertaining to the protection of forests, soil, water, fish and wildlife. The legislative requirements for inclusion of these items in the plan appear in different portions of sec. 896 of the Act.

Even if the chain of inferences may be so extended, it furnishes no basis for declaring the intent of Congress, in passing the Termination Act, to "protect and preserve" rights which the plain language of the act abrogates.

There is another, far more tenable, inference that may be drawn from all this, and that is the inference that Congress, in abrogating the exclusive and unrestricted hunting and fishing rights of the Indians, intended that state law should apply and that the plan itself, which was submitted to the Secretary of the Interior for approval, should reflect the adequacy of the state law to protect fish and wild-



life. This conclusion is supported by the fact that the Termination Act also required that the plan provide for "... protection of the forest on a sustained yield basis . . .," and authorized the Secretary of the Interior to accept the tribe's plan provided that he found "... that it conforms to applicable Federal and State law" (25 U. S. C. 896). Significantly, the plan itself provides for protection of the forest on a sustained yield basis, as required by 25 U. S. C. sec. 896, and state legislation for that specific purpose was enacted (Wis. Laws 1959, ch. 258; see *Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions*, 26 Fed. Reg. No. 82, April 29, 1961, p. 3727 et seq., Appendix, p. 2-a). The plan, on the other hand, contains no express provision for the protection of fish and wildlife. It is therefore fair to conclude that, in view of the abrogation of the Indian's rights in this area, separate provision for protection of fish and wildlife was unnecessary since such protection would be provided by the application of Wisconsin's conservation laws to the land and its people.

It should also be noted that the Wisconsin Supreme Court was not, as the court below indicates, 'unapprised of the passage of Public Law 280 when it rendered its decision in *State v. Sahapaw*, *supra*. The brief filed by the State of Wisconsin on rehearing in that case devoted 3 to 5 pages to a discussion of P. L. 280, and quoted extensively from its text.

VI. THE KLAMATH ACT, AND THE CASES DECIDED THEREUNDER, DO NOT SUPPORT THE DECISION OF THE COURT BELOW.

The Court of Claims indicated that its decision on the effect of the Termination Act is supported by three cases involving the Klamath Indians. 179 Ct. Cl. at pp. 511-512. The only one of the three cases which was reported, *Klamath and Modoc Tribes v. Maison* (D. C., Ore., 1956), 139 F. Supp. 634, did not mention the Klamath Termination Act (25 U. S. C. § 564), and, in fact, was decided five years before the Klamath termination was effected. See 26 *Federal Register*, August 12, 1961, p. 732.

The Court of Claims mentioned, however, that the two unreported cases held that the act preserved prior treaty rights. 179 Ct. Cl. at pp. 511-512.

The Klamath Termination Act gave each tribal member the option of remaining in the tribe and participating in a "tribal management plan" to be prepared by a designee of the Secretary of the Interior,<sup>11</sup> or of withdrawing from the tribe and having his interest in the tribal property converted into cash and paid to him outright. 25 U. S. C. § 564d (2). The Secretary was authorized to sell certain portions of the tribal land to obtain funds to pay those members electing to withdraw from the tribe, and any such lands not sold would be purchased by the United States. 25 U. S. C. § 564w. The remaining land, to be retained for those Indians electing "to remain in the tribe" is designated as "tribal property" and is to be managed by a trustee, apparently as a reservation. 25 U. S. C. § 564d.

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<sup>11</sup>Under the Menominee Act, the Menominee Indians were responsible for preparing their own plan.

The differences between the Klamath and Menominee termination programs are obvious. In the case of the Menominees, all tribal property, and all reservation lands were conveyed to a private corporation. Many of these lands have been sold to individuals. No Menominee had the option of "remaining in the tribe," as did the Klamath people. Instead, the Menominees were required to "formulate a plan for future control of tribal property and service functions." 25 U. S. C. § 896. Pursuant to the plan, the United States relinquished all interest in the real and personal property of the Menominee tribe.

It is true that the Klamath Act contained much of the same general language pertaining to application of "the laws of the several states." See, for example, 25 U. S. C. § 564q. However, the provisions of the Klamath Act differ in several significant respects in addition to those mentioned above. See for example, 25 U. S. C. § 564e (c); § 564r, which contemplates the continued existence of a tribal government; § 564w(q), which limits individual homesites to a life estate only; and § 564w(i), which reserves highway right of way use and maintenance to the United States.

The most notable differences are found in the express reservation to the Klamaths of water rights and treaty fishing rights. In fact, specific reservations of water rights are found in the Ute, Paiute, Wyandotte and Ottawa Termination Acts. 25 U. S. C. §§ 677r, 757, 806 and 851.

The reserved fishing rights of the Klamaths were considered—along with the effect of the Klamath Termination Act on hunting and trapping rights—in *Klamath and Modoc Tribes v. Maison* (9th Circ. 1964), 338 Fed. (2d) 620, which was not discussed in the decision of the Court.

of Claims. There the question was whether those Klamaths who elected to remain in the tribe had an untrammelled right to hunt and trap upon former reservation lands which had been taken by the United States pursuant to § 564w of the Klamath Termination Act, discussed above. The court held that such rights had been lost, stating (pp. 622-3):

*"The same issue was presented in State v. Santapaw (1963) 21 Wis. 2d 377, 124 N. W. 2d 41, cert. denied (1964) 377 U. S. 991, 84 S. Ct. 1911, 12 L. Ed. 2d 1044. That case dealt with the Act terminating the Menominee Tribe upon substantially the same terms as those of the Act before us. There the Court referred to House Concurrent Resolution 108, 83d Congress, 1st Session, pursuant to which the Menominee Termination Act was drafted and introduced. That resolution recited the policy of Congress 'as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship.'*

*"The Wisconsin Supreme Court referred to language of the Act 'hat 'the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.' It concluded that 'the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation.'*

*"The United States, appearing here as amicus curiae through the Attorney General, has in its brief expressed its view as follows:*

"The Klamath Termination Act and the many other termination acts of the 1950's and 1960's conclusively show that Congress now desires the Indians to be amalgamated with the rest of our population and not to be specially treated "because of their status as Indians" \* \* \* The purpose of the Klamath Termination Act to (a) end federal supervision, (b) remove from the Indians their special status as Indians, and (c) make state laws applicable to them "in the same manner as they apply to other citizens" are expressed and unequivocal in the terms of the Act."

"We are in agreement with this position.

"Notwithstanding this clear evidence of Congressional purpose, appellants contend that their right to hunt and trap, free from state control upon the area involved, is conferred by treaty; that while Congress has the power to abrogate such treaty rights, it will not be assumed to have done so in absence of express language; that there is nothing in the Termination Act limiting their right to hunt and trap upon the lands assigned to them by treaty.

"If appellants are correct in their position not only is their right to hunt and trap on the lands in question (or, indeed, on any former reservation lands which may have been taken into private ownership) one which is free from state control; their right is exclusive; no one else may hunt or trap on these lands. Their treaty secured to the Indians 'the exclusive right of taking fish in the streams and lakes, included in said reservation \* \* \*' 16 Stat. 707. By judicial interpretation of the District Court in 1956, 139 F. Supp. at 637, this right was extended to hunting and trapping.

"We agree that the Termination Act has not expressly dealt with any treaty rights respecting hunting and trapping. It has, however, most certainly reduced



the area to which those rights attach. By treaty the rights of the Indians were limited to the lands of the reservation. By the Klamath Termination Act, *supra*, it was provided that to the extent necessary to meet the requirements of the Act, lands should be taken from Indian ownership and sold. Such lands clearly were thereby severed from the reservation and thus released from any restrictions imposed upon them as reservation lands by the treaty.

\* \* \*

"If § 564m(b) has preserved to the Indians fishing rights and privileges to the extent previously enjoyed and thus not limited to the present reservation's area (a question not before us), it has done so by an express statutory grant of rights which the Indians could not otherwise have claimed since, under the treaty, their rights were limited to the reservation land. With complete awareness of the Indian's claims to hunting and trapping rights Congress has seen fit to limit the application of this section to fishing alone and must be presumed to have intended the section to be thus limited." (Emphasis added)

The portion of the Wolf River Treaty on which the Menominees' rights are founded reads as follows (10 Stat. 1064, 1065):

"Articles of agreement made and concluded \* \* \* between the United States of America \* \* \* and the Menominee Tribe of Indians \* \* \*"

\* \* \*

ARTICLE 2 \* \* \* the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin \* \* \*

Thus, the court's statement in the *Klamath* case, *supra*, to the effect that the rights are limited to reservation lands is equally applicable here. The Menominees' hunting and fishing rights are grounded upon the phrase "as Indian lands are held." These rights, like the rights of the Klamath Tribe, are based upon the government's "reserving" the lands for tribal use. The lands are, as a result of termination, now in the ownership of a private corporation, and the reservation no longer exists.

Thus, the Klamath Termination Act, and the *Klamath* case, if they constitute any authority at all, provide support for the proposition that the Menominees' special hunting and fishing rights were indeed extinguished by the Termination Act.

## VII. AFFIRMANCE OF THE DECISION BELOW WOULD CUT INTO THE SOVEREIGNTY OF THE STATE OF WISCONSIN, AND, WITHOUT CLARIFICATION WOULD RENDER IMPOSSIBLE THE MAINTENANCE OF CONSERVATION MANAGEMENT AND ENFORCEMENT PROGRAMS.

The Act of April 20, 1836 (5 Stat. 10), which created the Wisconsin Territory, contained an express reservation of Indian rights. Both the Enabling Act of August 6, 1846 (9 Stat. 56), and the Act of May 29, 1848 (9 Stat. 233), which admitted Wisconsin to the Union, are silent on the subject of Indian rights.

A few months after Wisconsin achieved statehood, the Menominee Indians ceded and conveyed all their Wisconsin lands to the United States in anticipation of the tribe's removal to other lands west of the Mississippi.

(Treaty of October 18, 1848, 10 Stat. 952.) The removal never fully succeeded, and on May 12, 1854, the United States carved the former Menominee Reservation out of this tract of ceded land in the Wolf River Treaty, which is the origin of the Menominee Tribe's special hunting and fishing rights.

Wisconsin was admitted into the Union on an equal footing with the original states. Accordingly, the Enabling Act of August 6, 1846, and the act admitting Wisconsin into the Union are in patent conflict with any grant, express or implied, of hunting privileges in favor of the Indians which would survive a conveyance of title to the reservation lands to a private corporation and the dissolution of the reservation and the tribal organization. By reason of its prior admission to the Union, the sovereignty of the State of Wisconsin had attached—in one form or another—to the lands designated in 1854 as the Menominee Reservation. Today, with all former reservation lands in private ownership (either by the corporation or by individual Indian citizens), that sovereignty is complete insofar as Menominee County is concerned. The special tribal hunting and fishing rights granted by the treaty cannot survive termination of the tribe as a political entity and termination of the reservation status of the Menominee lands.

If the Court of Claims decision is allowed to stand, and the law is stated to be that these treaty rights exist, it would appear that they must exist in Menominee Enterprises, Inc., the "successor entity" to the Menominee Tribe.<sup>12</sup> This conclusion follows from the fact that special

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<sup>12</sup>See discussion at pp. 24-26, *supra*.

Indian hunting and fishing rights are "property"<sup>13</sup>—as was ably argued by the petitioners herein before the Court of Claims—and the Termination Act specifically transferred all tribal "property" and all "assets" of the tribe to a private corporation.

If, as it appears, the hunting and fishing rights survive in the corporation, the criterion for exercise of these rights would appear to be ownership of a share or shares of stock in the corporation. The stock is, however, transferable by gift or inheritance to members of a shareholder's family—some of whom were not enrolled members of the tribe when the rolls were closed. It eventually will be fully and completely alienable. Thus, to say that the treaty rights follow the stock is to permit them to be acquired and exercised by non-tribal members, and, not inconceivably, by non-Indians.

Even if these rights were said to survive only in enrolled tribal members, they would, by virtue of the closing of the rolls in 1954, eventually disappear by attrition.

In either case, the problem of identification would be nearly insurmountable, insofar as conservation law enforcement is concerned. Some county residents would be exempt from these laws and some not.

It cannot seriously be claimed that such rights, if found to continue, will attach to all lands and waters within the former reservation. All these lands have been patented and conveyed to a private corporation and, in some cases to individual citizens. In *State v. Johnson* (1933),

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<sup>13</sup>See *Federal Indian Law*, *supra*, p. 583; Hobbs, "Indian Hunting and Fishing Rights," 32 Geo. Wash. L. Rev. 504, 517-518 (1964); and cases cited at pp. 24-26, in the Petitioner's Brief in the court below.

212 Wis. 301, 305, 249 N. W. 284, the Wisconsin Supreme Court stated:

"\* \* \* The controlling question, therefore, is whether fully patented lands located within the exterior limits of an Indian reservation may properly be held to be 'within the limits of an Indian reservation.' We do not think that lands, the title to which has been fully relinquished by the United States and to which the jurisdiction of the state, for taxation and other governmental purposes, has attached, are 'within the limits of an Indian reservation' as that language should be construed."

See also *Williams v. United States* (9th Circ., 1954), 215 Fed. (2d) 1, 3; cert. den. 348 U. S. 938; *Clairmont v. United States* (1912), 225 U. S. 551, 32 S. Ct. 787, 790, 56 L. Ed. 1201.

The parties to this action have not offered any solution to these fundamental problems, which are certain to arise should this court hold that the 1854 treaty rights survive. If such a decision is issued with no indication of the entity or entities who presently possess them, the method of determining the constituency of these entities, whether they are transferable, or on what land areas they may be exercised, the state's efforts to maintain sound and effective conservation management and enforcement programs will be thwarted. Presumably, the wardens would have to determine whether the individual is possessed of these rights, and whether the land on which he stands has been conveyed or still remains in corporate ownership. As time passes and the corporate stock, as well, as the land becomes fully alienable, these problems will be compounded. The parties have done no more than claim that these rights,



whatever they may be, continue to exist. Wherever, and in whomever they exist is left open.

### VIII. TREATY HUNTING AND FISHING RIGHTS CONSTITUTE VALUABLE PROPERTY, AND THEIR LOSS IS COMPENSABLE.

Since this question will be discussed by the claimants, the Menominee Tribe, et al., the State of Wisconsin, as *amicus curiae*, will do no more than state its contention that the exclusive hunting and fishing rights held by the Menominees under the provisions of the Treaty of 1854, were abrogated by the United States through the enactment of 25 U.S.C. secs. 891-902, and that, such rights being valuable property rights, their loss is compensable by the federal government.

The State of Wisconsin, through its supreme court and law enforcement officers, was merely carrying out the Congressional mandate in applying its fish and game laws to the Menominees, *State v. Sanapaw, supra*, and is in no way liable for the loss suffered by the Menominee people, as intimated by the court below.

### IX. CONCLUSION

The Congress of the United States has plenary power over the affairs of the Indians and Indian Tribes. By the express terms of the Termination Act the United States Congress has abolished the Menominee Indian Reservation, and has ended the Federal trusteeship over the Menominee Indian people. Accordingly, the reservation area and the enrolled members of what was formerly the Menominee

Indian Tribe are now fully assimilated under the laws of the State of Wisconsin.

Prior to termination, the United States held title to the forest lands and other property within the reservation. The people were governed and served by a tribal government operating under a tribal constitution. Among the services performed by the tribal government were law and order, and conservation enforcement functions. The governmental structure and all tribal property was under the general supervision of the federal government.

Today the former reservation is a duly organized county within the State of Wisconsin. Governmental services are provided by the state and duly constituted county and town boards. All land is owned by a private corporation or individual residents of the county.

Section 899 of the Termination Act is clear and unambiguous. By its express terms, the laws of Wisconsin, without exception, apply to the members of the tribe in the same manner and to the same extent as they apply to other citizens within the state. Conflicting views concerning the effect of the Act (H. R. 2828) upon hunting and fishing by the Menominees were presented at the joint hearing of the committees of Congress. Thus advised and with an alternative bill before it which expressly reserved hunting and fishing privilege (H. R. 7135), Congress enacted the bill which did not reserve such privileges. And, when Congress intends that hunting or fishing privileges enjoyed by Indians be preserved when state jurisdiction over Indians is enlarged by federal act, it has expressly so provided. In P. L. 280 (67 Stat. 588), *supra*, hunting and fishing rights were expressly exempted. In the Klamath Termination Act, water and fishing rights and privileges of the Indians under

Federal treaty, were expressly preserved (68 Stat. 718, 722; 25 U. S. C., sec. 564m). Thus Congress is not unmindful of the matter, and indeed the issue was specifically raised at the hearings on the Menominee bills.

The *Klamath* case is supportive of the position of the State of Wisconsin herein, rather than in view of the parties or the Court of Claims.

The plain intent of Congress to abrogate these rights is not overcome by the contemporaneous passage of Public Law 280, nor by oblique reference to this law in an unrelated portion of the termination plan.

The rights so abrogated by the United States are valuable property rights, arising from treaty, and their loss is compensable by the federal government.

The State of Wisconsin, *amicus curiae*, respectfully urges the Court to reverse the decision of the Court of Claims herein, insofar as it holds that the exclusive treaty rights of the claimants, the Menominee Tribe of Indians, et al., have not been abrogated by the Menominee Termination Act, and that the United States is not liable therefor.

Accordingly, it is urged that the judgment granting the government's motion for summary judgment and dismissing the petition of the plaintiffs be vacated and set aside.

Respectfully submitted,

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# APPENDIX

## DEPARTMENT OF THE INTERIOR

## Bureau of Indian Affairs

PLAN FOR THE FUTURE CONTROL OF MENOMINEE  
INDIAN TRIBAL PROPERTY AND FUTURE  
SERVICE FUNCTIONS

\* \* \*

Statement of the Plan and Description of its  
Objectives and Goals

Pursuant to section 896 Title 25, U. S. C. (sec. 7, Public Law 399, 83d Cong., as amended) a Plan such as this was submitted by the Menominee Indian Tribe (herein sometimes called "the Tribe") on January 26, 1959, to the Secretary of the Interior (herein sometimes called "the Secretary"). Under date of April 30, 1959, he wrote the Tribe stating that in view of the contingencies still attaching to our Plan, especially the unfinished legislation, he resubmitted the Plan conditionally as his Plan for a period of three months for negotiation purposes with the understanding that if the Plan should not by August 1, meet the approval of the Secretary for reasonable equity and legal conformity, he would have to take action as if there were no Plan.

On July 30, 1959, the said legislation was finished by signature of the Governor of Wisconsin on three bills on which the legislature completed action on July 24. These bills and the remainder of the Plan as revised after numerous conferences with State officials were submitted to the Secretary on July 30, 1959, which is included hereinafter.



This was accepted for the Secretary by letter of the same date which is included hereinafter.

After extensive study by the staff of the Secretary, including those in the Bureau of Indian Affairs, a conference was held by such staff with representatives of the Tribe and of the State of Wisconsin on October 26 through 29, 1959, inclusive, at which agreement was reached for changes in the detail but not the principles of the Plan, and the Secretary so stated by letter of October 30, 1959, as hereinafter included. The Plan as herein presented (and defined in the Table of Contents) includes the changes as agreed upon.

#### OBJECTIVES AND GOALS

To better insure the welfare of the Menominee people, their heirs and descendants, the Menominee Indian Study Committee and representatives of the Tribe during the course of their meetings agreed upon several objectives, which we believe it is desirable to record.

1. To promote the most beneficial use of the Menominee property, consisting substantially of forest land, State law and deed covenants were agreed upon which will enforce the maintenance of sustained yield principles in the care and preservation of the forest. It is believed that within thirty years sustained yield will have served the ultimate benefit of the Menominee people as a tribe, at the end of which time the owners can reassess their condition. If deemed advisable, the forest could be sold to or acquired in part by the State for the benefit of all its citizens, and particularly for those of Menominee extraction who wish to remain on the land.

2. To overcome gaps in essential training and experience among the 3,270 Menominee members and to lessen the influence of non-essential politics in the management of business affairs the voting trust principle was adopted as a device to better insure stability in the Menominee corporation to be.

3. Basic rights of Menominee members, their heirs and descendants, to hold residence and employment on the Menominee land are tied into the articles and by-laws as a safeguard against possible abuse of ownership or other unfair exploitation, recognizing a preferential right in such persons:

4. A merit system in government is desirable and the Menominee county board will be requested to seek its establishment. Buildings owned by the tribe and needed in governmental operations will be transferred to the best municipal use without cost to the new county or town.

5. Hospital and medical services and the continued operation of public utilities are important elements in the welfare and progress of the Menominee community and should be continued in operation. Alternatives are in question and can hardly be resolved or bound until the corporation and municipal officers can study the practical effects of the termination of Federal supervision and the commencement of State licensing and regulation.

Section 896, Title 25, U. S. C. provides as follows:

The [Menominee] tribe shall \* \* \* formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the

fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision.

The Plan formulated and submitted by the Tribe is designed to meet the requirements of the law by (1) providing machinery for municipal activities heretofore supervised by the Department of the Interior, including health, education, welfare, credit, roads, and law and order, and (2) providing a sound economic base through realization and use of communal tribal property and operation of the Menominee Forest on a sustained yield basis.

*Description of legislation.* The first objective has been achieved, to a large extent, by three laws which became a part of the Wisconsin Statutes on July 30, 1959. Chapter 259, Wisconsin Statutes, one of those laws, creates Menominee County as Wisconsin's seventy-second county. It becomes effective on the date of publication of the Termination Plan in the FEDERAL REGISTER by the Secretary under section 896, Title 25 U. S. C. This is intended to be and should be the same date as the proclamation in the FEDERAL REGISTER of transfer of property under section 899, Title 25 U. S. C. This law:

1. Creates Menominee County from all reservation areas as described therein, now included in Shawano and Oconto Counties.

2. Provides appropriate machinery for requiring and preserving necessary county records.

3. Attaches Menominee County to Shawano County for necessary judicial functions and provides that the District Attorney for Shawano County shall serve Menominee County.

4. Establishes one political town to consist of area of entire Menominee County (which will contain ten surveyor townships).

5. Attaches Menominee County to Shawano County for the purpose of the office and functions of the County Superintendent of Schools.

6. Attaches Menominee County to Shawano County for functions of the juvenile court and the judge of juvenile court.

7. Provides for the election of a Town Board by precincts and at large whose members ex-officio constitute the County Board.

8. Provides for handling of some town and county offices as part-time and combined assignments.

9. Provides machinery for assessment and collection of taxes in transition years.

10. Permits restraint on securities of any corporation or organization created by the Menominee Tribe.

11. Includes Menominee County in area of Tenth Circuit Court.

12. Creates a Shawano-Menominee County Court, and extends the jurisdiction of the Shawano City and County municipal court to the County of Menominee.

Chapter 260, Wisconsin Statutes, is a minor technical enactment required to distribute to Menominee County moneys held in escrow by the State's Treasurer. These moneys have been accumulated by the State of Wisconsin from taxes from income, intoxicating liquors and utilities.

According to Wisconsin law, these funds must be distributed to the county.

The Tribal Lending Agency has already received a transfer from the Secretary of the Interior of \$368,196.96 in tribal funds under section 897, Title 25 U. S. C.

This Agency is operated under section 224.10, Wisconsin Statutes, and now has most of these funds out on loan to tribal members. This law needs amendment by the Wisconsin Legislature in order to provide for the appointment of Trustees by another agency than the "governing body of the Tribe" and to define the eligible borrowers otherwise than as "tribal members." It is proposed to ask the Legislature of 1961 to provide for appointment of trustees by the stockholders of Menominee Enterprises, Inc., or any successor thereof, and for loans to enrolled tribal members (as of June 17, 1954, as proclaimed) and their spouses and descendants and such additional classes as may be recommended by the Trustees. If such legislation fails of passage the Commissioner of Banking of Wisconsin will be asked to approve such changes by regulations adopted by the Trustees. Until termination date no change is required, and thereafter the existing Trustees will serve out their original terms, which will permit continuity pending action proposed above.

It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menominee Reservation having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U. S. C. 1162). Welfare problems will be handled within the framework of state law,



particularly pursuant to specific provisions of chapter 259, Wisconsin Statutes. Agreement has been reached between the United States and the State of Wisconsin with respect to improvement and transfer of roads within the Menominee Reservation.

Chapter 258, Wisconsin Statutes, provides "a new method of taxation of forest lands required by federal law to be operated on a sustained-yield basis and the regulation of such land." This act accepts the principle that a forest required by law to be operated on sustained-yield has a fair market value equivalent to 40 percent of the fair market value of a forest owned and operated without such restriction. To be eligible for tax benefits under this chapter, the owner must apply to the Commissioner of Taxation for Wisconsin and file a forest management plan with the Conservation Commission of that State. The Conservation Commission must find that the plan provides for sustained-yield management of the forest lands consistent with sound forestry practices. (These are defined, and specific provision is made for catastrophic changes such as fire, flood, storm, and epidemic.) The Conservation Commission must inform the Commissioner of Taxation of its findings. The Commissioner of Taxation must then determine whether the forest lands involved are eligible for and qualified for taxation under chapter 258. If so, the Commissioner of Taxation orders the lands entered on a special property tax roll. The lands are then assessed as having a full value equal to 40 percent of fair market value of unrestricted forest lands. An application for taxation under chapter 258 may be denied only after hearing.

Each year, the owner of sustained-yield forest lands is required to submit a sworn statement giving data which

will enable the Conservation Department and the Commissioner of Taxation to determine whether the land involved shall continue to be taxed under this special law. Chapter 258 allows revision of the forest management plan upon submission of a revised plan not later than six months prior to the end of each cutting cycle. If the Conservation Commission finds that the revised plan is adequate to ensure continued sustained-yield management, it must enter such an order. Approval of a revised plan may not be denied without a hearing.

An owner may withdraw from sustained-yield operation any parcel of land not exceeding ten acres in size and 250 acres cumulatively in each calendar year. Larger parcels may be withdrawn only if the Commissioner of Taxation, after consultation with the Conservation Commission, finds that the lands involved may be dedicated to a higher beneficial use. Such lands may later be reinstated under chapter 258 upon appropriate application. The Commissioner of Taxation and the Conservation Commission are given the right to conduct hearings and examine all records to determine that the requirements of the law are being followed. Criminal penalties are provided for violations, such as excess cutting or failure to follow the management plan. Equitable jurisdiction is granted to the Circuit Court to compel "management and classification of lands" according to the articles of incorporation of a Wisconsin corporation.

*Description of economic plan.* The economic plan, designed to promote the highest beneficial use of the communal property, is set forth in six basic documents: (1) Articles of Incorporation of Menominee Enterprises, Inc., (2) By-Laws of Menominee Enterprises, Inc., (3) a common

stock and voting trust, (4) a bond indenture, (5) a Menominee Assistance trust, (6) a Certificate of Beneficial Interest.

One Certificate of Beneficial Interest in form attached will be issued pursuant to section 893 Title 25 U. S. C., with list attached thereto of the tribal roll of 3,270 members as of June 17, 1954 (as finally proclaimed). The Certificate will be issued as of June 17, 1954, in advance of the termination date, and will be held by the Coordinating and Negotiating Committee until that date. At that time, the Committee will mark it "cancelled" and file it with the records.

It is a part of this Plan that (1) the issue of stock to the said Coordinating and Negotiating Committee, (2) the issue of voting trust certificates to tribal members and lawful distributees of deceased members upon deposit of the stock in the Common Stock and Voting Trust, (3) the issue of income bonds, (4) the transfer of real and personal property to the said Coordinating and Negotiating Committee and/or to Menominee Enterprises, Inc., or any subsidiary, (5) the transfer of real and personal property to any public body; shall all be in substitution for and consideration of cancellation of the Certificate of Beneficial Interest and no one shall thereafter have any rights or interest in such Certificate.

Such issuance of voting trust certificate, and income bonds to individuals shall be to or for those members so proclaimed who are alive at date of termination, and to the personal representatives, heirs or next of kin under the laws of the State of Wisconsin of those members who predecease the date of termination, as personal property shall be distributable.

The plan as to the Certificate of Beneficial Interest provided herein shall constitute the regulations of the Tribe governing alienability of interests under said section 893.

A copy of the cancelled Certificate shall be delivered to each recipient of voting trust certificates and income bonds at the time of distribution thereof.

The Board of Directors of Menominee Enterprises, Inc. will be elected by the holders of the common stock. While the voting trust is in existence (it may be terminated by the tribal members who become holders of the voting trust certificates in ten, twenty, or thirty years), the voting trustees will elect the board. It is contemplated that four of the nine members of the board will be persons listed on the final Menominee roll, and the remaining five will be men of experience in industry, the professions, and government.

The interests of minor members, persons non compos mentis and those otherwise deemed in need of assistance will be entrusted to the First Wisconsin Trust Company under the terms of the Menominee Assistance Trust. The selection of this trust company was recommended by the Coordinating and Negotiating Committee of the Menominee Tribe and confirmed by the General Council in 1958. Top officials of the First Wisconsin Trust Company have long evinced keen interest in Menominee affairs, responded promptly to requests by the tribal officials, and have contributed considerable time and assistance in formulation of the Plan. Utilization of one trust company will effect considerable savings for the beneficiaries when the alternative of a multitude of guardianships is considered. It is believed that the experience and advice of First Wisconsin Trust Company will be of considerable assistance during

the formative years of Menominee Enterprises, Inc. First Wisconsin Trust Company has agreed to assume the fiduciary responsibility for the beneficiaries at rates comparable to going rates for similar activities. Any U. S. bonds held by the Federal Government for any of such beneficiaries at termination date will be released to the Menominee Assistance Trust.

*Procedure on establishment of Menominee Enterprises, Inc.* The selection of voting trustees will occur well in advance of the termination date and before any trust in fact exists. The initial voting trustees will consist of four enrolled members of the Tribe elected by the General Council and three non-tribal members selected jointly by the Advisory Council and the Coordinating and Negotiating Committee, subject to confirmation by the General Council. In case any should not be confirmed, he will be replaced by another selection by the same bodies for confirmation. It is expected that these three voting trustees will be outstanding Wisconsin citizens who have shown an interest in and understanding of the problem.

Contemporaneously with the selection of initial trustees, the members of the Coordinating and Negotiating Committee, as individuals, will incorporate Menominee Enterprises, Inc., will subscribe to all the stock as representatives of the persons entitled thereto, and hold the organizational meeting of the corporation. Before the organizational meeting of the corporation is held, the initial voting trustees will informally name the individual directors of the corporation, and those persons will be named in the articles of incorporation and will be formally elected by the subscribers to stock (the Coordinating and Negotiating



Committee) at the organizational meeting of the corporation.

After being elected, the directors will hold their first meeting and will accept the stock subscription for 327,000 shares of common stock, \$1.00 par value, for a consideration of \$327,000. The Secretary of the Interior will advance cash for this purpose from the tribal 4 percent funds. Upon paying in the \$327,000 consideration, the corporation will issue a single stock certificate to the Coordinating and Negotiating Committee for 327,000 shares of stock. That Committee will then create the voting trust, naming as trustees the persons previously selected by the General Council of the Tribe, will deposit the common stock and instruct (on direction from the Secretary) the trustees to issue voting trust certificates evidencing such stock to the enrolled members of the Tribe and their heirs or next of kin on termination date or to First Wisconsin Trust Company, in the case of persons covered by the Menominee Assistance Trust. On termination date, or shortly before, the Secretary will transfer to Menominee Enterprises, Inc., as a capital contribution all of the remaining tribal assets which are to constitute corporate property, and the corporation will issue the income bonds to enrolled members or heirs, and to First Wisconsin Trust Company for persons covered by the Menominee Assistance Trust. Such persons will be determined by the Secretary prior to such transactions by a finding under section 900, Title 25 U. S. C.

Although income bonds of \$10,000,000 will be authorized, it is proposed to issue bonds at a par value of \$3,000 to each of the 3,270 enrolled members at an aggregate of \$9,810,000 par value.

Immediately after the transfers to it, the corporation, through its Board of Directors, will make a capital contribution of all the remaining tribal assets estimated to have a value of about \$7,500,000 which will be received as a capital contribution to "paid in surplus" and later transferred by the Board and added to "stated capital."

Each Voting Trust Certificate will contain the following language:

This Certificate represents 100 shares of stock of Menominee Enterprises, Inc. The stated capital which is the net book value on January 1, 1961, was \$..... per share of stock, or \$..... for the stock represented by this certificate. This price is the cost basis to a member of the Menominee Indian Tribe for federal and state income tax purposes under section 898, Title 25 U. S. C. and section 71.015, Wisconsin Statutes, for computing gain or loss in case of sale. The corporate assets represented by the capital of the corporation consist principally of forest lands and other physical property which have a per share value at least equal to that stated above, but which will not be realized or become income producing for some time to come.

The Secretary will issue separate deeds for lands presently classified as forest lands and other lands to Menominee Enterprises, Inc. He will also issue a deed or deeds to appropriate body or bodies for designated public lands, buildings and roads for school district, county and town, and a deed and bill of sale to the organization operating the hospital. The deed for the forest lands will contain the following language.

The parties hereto mutually covenant and agree for the benefit of the State of Wisconsin that the lands conveyed hereby shall be operated on a sustained-yield basis until released therefrom under the laws of Wisconsin or by act of Congress.

The parties further mutually covenant and agree for the benefit of the State of Wisconsin that for a period of 30 years commencing with the date of this deed the ownership of lands conveyed hereby shall not be transferred, nor shall such lands be encumbered without the prior consent of the State Conservation Commission of Wisconsin and approval of the Governor of Wisconsin unless released from sustained-yield basis under the laws of Wisconsin.

A lawful order removing land from sustained-yield taxation pursuant to the Wisconsin Statutes as they now exist or as they may be amended shall constitute a method of release.

These covenants shall be enforceable only by an action for an injunction brought in its own name by the State of Wisconsin.

An appraisal of the tangible property made by tax appraisers of the State of Wisconsin shows that the Menominee Forest is worth about \$30,000,000 based on stumpage prices. Other Menominee property is valued at approximately \$4,000,000. Based on the 40 percent formula adopted by the Wisconsin Legislature, this means that the Menominee Forest is worth, under the requirement of sustained yield operation, approximately \$12,000,000. This leaves a valuation on Menominee property of approximately \$16,000,000. By increasing the annual cut on the Menominee Forest, within agreed limits of sound sustained-yield practice, it is estimated that Menominee Enterprises,

Inc. will be able to realize net earnings of \$400,000 to \$450,000 per year after taxes and before payments to stockholders. This is approximately the amount of payments made to tribal members over the past several years as so-called "stumpage payments." It is contemplated that most of this amount will be paid to holders of the income bonds to be issued by the corporation. As stated, income bonds of \$10,000,000 will be authorized bearing 4 percent interest if earned, and an aggregate of \$9,810,000 par value issued to the 3,270 enrolled members or their heirs. These bonds may be utilized for purchase of homestead or farm property from the corporation at par value under article XI of the By-Laws. They may not be sold for a period of three years, but, in the meantime, may be pledged for loans. The corporation will reserve an option to meet bona fide offers after the three year period. During the first three years, pledgees will be required to refund to the pledgors any amounts in excess of the amount pledged plus lawful charges.

The Menominee Tribe now operates a conventional sawmill. This is done pursuant to the act of March 28, 1908 (35 Stat. 51), an Act which constituted an early model for sustained-yield forestry practices. The Menominee Indian Mills have not advanced perceptibly into specialized branches of the highly competitive lumber industry. In order to survive and to improve its present economic situation, such expansion is deemed essential. Tribal leaders, the Department of the Interior, and other advisors are currently considering expansion possibilities. Promising possibilities are a veneer plant and a dimensions plant. The latter would require a relatively small financial outlay, but would utilize materials which are now largely wasted.

A comprehensive memorandum on these and other possibilities has been prepared by Mr. Arlie Toole of the Great Lakes Experiment Station and will be considered carefully by Menominee Tribal leaders and executives and directors chosen to operate Menominee Enterprises, Inc.

In addition, the Tribe and its successor Corporation have available some of the most natural commercial recreational possibilities in the United States. Development of these resources is being considered, and such study will continue. Assistant Secretary Ernst has volunteered to make available the knowledge and advice of the National Parks Service and knowledge and advice of the National Parks Service and Bureau of Fish and Wildlife in this effort. What will develop along this line is uncertain, but this is one field which will have high priority on the part of tribal leaders and the executives and Board of Directors of Menominee Enterprises, Inc.

MENOMINEE COORDINATING AND  
NEGOTIATING COMMITTEE,  
GEORGE W. KENOTE,  
*Chairman.*

GORDON DICKIE,  
MITCHELL A. DODGE,  
JEROME GRIGNON.

Approved:

GEORGE W. ABBOTT,  
*Assistant Secretary of the Interior.*



## MENOMINEE COMMON STOCK AND VOTING TRUST

\* \* \*

### V. TRANSFER OF TRUST CERTIFICATES

1. The Trust Certificates issued hereunder shall be transferable only on the books of the Trustees, under such regulations as the Trustees may make in writing and upon compliance with this Part V, and the Trustees shall at all times and for all purposes treat the registered owner of each outstanding Trust Certificate as the sole owner thereof. Upon the transfer of a Trust Certificate on the books of the Trustees the transferee shall, except as herein otherwise provided, be substituted for the prior registered holder and shall have all of the rights and be subject to all the liabilities of the original Beneficiary. The Trustees may, in their discretion, from time to time cause the transfer books to be closed for such reasonable period of time as the Trustees may deem expedient. Subject to such reasonable regulations as the Trustees may make as aforesaid, a Beneficiary may surrender Trust Certificates to the Trustees for exchange for a greater or lesser number of Trust Certificates representing the same aggregate number of shares of stock as were represented by the Trust Certificates so surrendered, but no Trust Certificate representing a fraction of a share of stock shall be issued without the approval of the Trustees.

2. No Beneficiary may dispose of any or all of the Trust Certificates held by him, whether by sale, gift, bequest, pledge, seizure, sale by legal process, transfer by operation of law or any other means (hereinafter collec-

tively called "transfer"), except in accordance with the provisions of this paragraph 2 of Part V, and the Trustees shall treat as void and not permit to be transferred on the transfer books of the Trust, at any time, any Trust Certificates where a change of ownership has occurred in violation of the terms of this paragraph 2 of Part V.

(A) No Beneficiary may transfer any Trust Certificates prior to January 1, 1966, except that transfers may be made by gift or by will or operation of laws of descent at death, subject to the conditions specified in paragraphs (C) (1) and (2) and (D).

(B) Except as provided in paragraphs (C) and (D) following a Beneficiary (hereinafter called the "Offering Beneficiary") desiring to transfer and having received a bona fide offer to purchase any part or all of his Trust Certificates during the period January 1, 1966, to the termination of the Trust or earlier termination of these restrictions, as hereinafter provided, shall (1) give written notice thereof to the Company, stating the number of Trust Certificates he desires to transfer (hereinafter called "Offered Certificates"), the identity of the proposed transferee, the price which the proposed transferee has offered to pay for the Offered Certificates (hereinafter called the "option price"), and the Offering Beneficiary's address and (2) give satisfactory evidence that a bona fide offer has been received. Such notice shall constitute an irrevocable offer to sell the Offered Certificates to the Company at the option price, in accordance with the provisions hereof. If the Company elects to purchase the Offered Certificates, it shall within 90 days after receipt of such offer give written notice thereof to the Offering Beneficiary, and shall tender to the Offering Beneficiary at his address as specified, in cash

or its equivalent, the full price for the Offered Certificates, whereupon the Offering Beneficiary shall forthwith deliver to the Secretary of the Company the Trust Certificates duly endorsed for transfer and with all necessary transfer stamps affixed. If the Company shall not elect to purchase the Offered Certificates, as aforesaid, the Offering Beneficiary shall have the right, at any time within 60 days after expiration of the aforesaid 90-day period, but not thereafter, to transfer all but not less than all, of the Offered Certificates to the aforesaid proposed transferee but no other person, at a purchase price not less than the option price. The Trust Certificates in the hands of a transferee shall be subject to this Trust, and there shall be no further transfer of said Trust Certificates except in accordance with the provisions of this Part V.

(C) (1) Notwithstanding the provisions of the foregoing paragraph (B), any Beneficiary may transfer all or any part of his Trust Certificates by gift, directly or in trust, while living or by will or operation of laws of descent at death, to or for the benefit of himself, his spouse, or any of his children, or other descendants, or, if none, to his heirs-at-law. Likewise, any trustee of any trust may, upon termination of such trust with respect to a particular beneficiary, transfer the Trust Certificates representing such beneficiary's aliquot portion of the trust assets to the particular beneficiary. In the case of any such transfer, said spouse, children, descendants, heirs-at-law and trust beneficiaries shall receive and hold such Trust Certificates subject to the provisions of this Part V, and there shall be no further transfer of said certificates except in accordance with the provisions of this paragraph 2 of Part V. For purposes of this subparagraph (1), an inter vivos transfer

to any person named herein, in consideration of an Agreement by the transferee to provide support for the life of the Beneficiary, shall be deemed a gift.

(2) Any transfer of Trust Certificates by gift or will to any person other than those named in subparagraph (1) of this paragraph (C) shall be deemed to give rise to the granting of an option by the transferee to the Company to buy the Trust Certificate so transferred at fair market value as of the date of election to purchase. The Company shall have 90 days after receipt of a written notice from transferee, setting forth the facts of such transfer and the transferee's address, to elect to purchase such Trust Certificate: *Provided, however, That* when the Company has knowledge of such a transfer but has received no written notice from the transferee, it may elect to purchase such Trust Certificates at any time by giving notice of election to purchase to the transferee at his address, or if none be known to the Company, at the address of the transferor. Fair market value for the Trust Certificate shall be such amount as may be agreed upon by the Company and the transferee. In the event the Company and the transferee are unable to agree on fair market value within 20 days of the date the Company gives notice of election to purchase, the Company shall select an appraiser and the transferee shall select an appraiser and the two appraisers so selected shall, within 20 days after selection of the first of the two appraisers, select a third appraiser, or in the event the two appraisers first chosen shall be unable to agree on the selection of a third appraiser within the aforesaid 20-day period, a third appraiser shall be selected in the manner provided by the rules of the American Arbitration Association. The three appraisers shall, with 60 days after

selection of the third appraiser, determine the fair market value of the Trust Certificate and shall serve notice of such determination upon the Company and the transferee. All appraisal proceedings shall be conducted pursuant to the provisions of the American Arbitration Association so far as applicable. Cost shall be borne equally by the Company and the transferee. In the event the transferee shall fail to select the second appraiser within the aforesaid twenty (20) day period, the appraiser selected by the Company shall act alone and make and serve notice of his determination within sixty (60) days after his selection. When fair market value has been determined, the Company shall within ten days of such determination tender to transferee, in cash or its equivalent, the full price for the Trust Certificate, and the transferee shall forthwith deliver to the Secretary of the Company the Trust Certificate duly endorsed for transfer and with all necessary transfer stamps affixed. If the election to purchase is not made, the Trust Certificates in the hands of a transferee shall be subject to this Trust, and there shall be no further transfer of said Trust Certificates except in accordance with the provisions of this paragraph 2 of Part V.

(D) Notwithstanding the provisions of paragraphs (A) and (B), any Beneficiary (hereinafter called "pledgor") may transfer all or any part of his Trust Certificates to any person or persons (hereinafter called "pledgee") in a bona fide pledge of such Trust Certificates as collateral for a loan made by the pledgee to the pledgor; *Provided, however,* That prior to January 1, 1966, a Beneficiary may pledge the Trust Certificates only to the Company or the Menominee Indian Tribal lending agency or its successor; provided, further, that the pledgee shall acknowledge to



the Company in writing that such Trust Certificates or any new Trust Certificates issued in lieu thereof are subject to the provisions of this Voting Trust Agreement restricting the transfer of Trust Certificates, including the next sentence. In the event of any default under the pledge agreement by the pledgor such Trust Certificates shall thereupon and continuing thereafter, until sale or transfer by pledgee following waiver of this option by the Company and the State of Wisconsin, or curing of the default by pledgor, be subject to purchase by the Company or its nominee in accordance with the provisions set forth in paragraph (B) above (with the pledgee deemed to be the Offering Beneficiary), granting to the Company a continuing option to buy the Trust Certificates at fair market value as of the date of default. The pledgee shall within 90 days following such default give written notice thereof to the Company, together with proof of the facts satisfactory to the Company. The procedure on election to purchase such Trust Certificates, and on determining fair market value and conditions governing further transfer of the Trust Certificates or any new Trust Certificate issued in lieu thereof shall be as set forth in paragraph (C) (2) above. The redemption by pledgor of any Trust Certificate pledged shall not be deemed a disposition or transfer under the provisions of this paragraph 2 of Part V.

(E) The restrictions on transfer imposed by this paragraph 2 of Part V shall terminate on January 1, 1981, and thereafter Trust Certificates may be transferred free of such restrictions.

3. Any option to purchase Trust Certificates granted to the Company under this article V, which the Company might but fails to exercise, shall be assigned by the Com-

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pany to, and may be exercised by, the State of Wisconsin or its authorized agent or agency. Any such assignment shall be made not later than forty-five (45) days after the date the Company receives notice of its option to purchase the Trust Certificates.

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## SUMMARY OF PERTINENT

## STATE LEGISLATION 1955-1965

*1955 Legislature*

Joint Resolution No. 72, A., on June 17, 1955, created the Menominee Indian Study Committee of the Joint Legislative Council. A 14-member committee was directed "to study the (transition) problems and develop specific recommendations and legislative proposals for presentation to the Joint Legislative Council so that it can introduce the necessary bills [at the opening of the 1957 legislature]."

Bill No. 775, A., relating to the supervision by the banking department of "the loan funds of any Indian tribe which are transferred to the custody of such tribe by the United States" was introduced on May 19, 1955, by the assembly committee on rules, and was published as Ch. 525, Laws of 1955, on August 9, 1955.

Bill No. 801, A., appropriated \$5,000 to the study committee; it was introduced on June 10, 1955, by the assembly committee on rules, and was published as Ch. 596, Laws of 1955, on Aug. 24, 1955.

Joint Resolution No. 119, A., was introduced on October 5, 1955, by the assembly committee on rules to change the study committee membership from 14 to 16 by adding 1 member each from the state board of health and the governor's commission on human rights. It was concurred in by the senate on Oct. 6, 1955.

*1957 Legislature*

Bill No. 798, A., continuing the study committee, was introduced on May 29, 1957, by the joint committee on finance at the request of the legislative council. It was published as Ch. 464, Laws of 1957, on August 6, 1957. This became § 13.352, Wis. Stats.

*1959 Legislature*

Bill No. 598, S., creating Menominee county upon termination becoming final, was introduced by the legislative council on May 21, 1959, and was published as Ch. 259, Laws of 1959, on Aug. 7, 1959. This act also authorized a 5-year restriction on transfer of Menominee Enterprises' stock certificates by their Menominee owners (§ 231.45, Wis. Stats.)

Bill No. 892, A., providing a new method of taxation of Menominee forest lands required by the federal termination act to be operated on a sustained yield basis, was introduced on May 27, 1959, by the legislative council, and was published as Ch. 258, Laws of 1959, on August 6, 1959.

Bill No. 893, A., relating to shared taxes held in escrow for the Menominee Indian reservation, was introduced by the legislative council on May 27, 1959, and was published as Ch. 260, Laws of 1959, on August 7, 1959.

*1961 Legislature*

The 1961 session saw a small reduction in pertinent proposals for consideration. Bill No. 53, S., creating § 224.10 (1) (c), Wis. Stats., relative to the administration of the Menominee Indian tribe loan fund after termination, was

introduced on January 24, 1961, by the legislative council, and was published as Ch. 83, Laws of 1961, on May 27, 1961.

Bill No. 54, S., to renumber § 20.520 (5) and to create § 20.520 (5) (b), Wis. Stats., relative to an appropriation to assist the Menominees in the establishment of the Menominee county government, was introduced on January 24, 1961, by the legislative council, and was published as Ch. 6, Laws of 1961, on March 8, 1961.

Bill No. 52, S., to amend § 70.057, Wis. Stats., relating to federal control over the Menominees, was introduced on January 24, 1961, by the legislative council and was published as Ch. 46, Laws of 1961, on May 9, 1961.

Bill No. 153, S., relating to the computation of the first highway allotments for Menominee county and town, was introduced on February 9, 1961, by the senate committee on highways, and was published as Ch. 115, Laws of 1961, on June 13, 1961.

Resolution No. 19, A., relating to the birth of Menominee county as Wisconsin's 72d county, was introduced on May 3, 1961, by the entire membership of the assembly, and was adopted on the same day.

### *1963 Legislature*

In the 1963 session, there was an increase in Menominee proposals. Bill No. 34, A., to create § 65.90 (7), Wis. Stats., relating to the anticipation of revenues by the town of Menominee under the budget provisions in § 65.90 (1) and (2), was introduced on January 15, 1963, by the legislative council and was published as Ch. 38, Laws of 1963, on April 30, 1963.



Bill No. 356, A., relating to the selection of supervisors in counties containing a single town, was introduced on February 28, 1963, and was published as Ch. 375, Laws of 1963, on October 8, 1963.

Bill No. 2, S., to create § 20.670 (5) and 49.70, Wis. Stats., relating to a welfare program for the owners of Menominee Enterprises securities by authorizing the state department of public welfare to lend up to \$1 million to Menominee for welfare purposes on the security of their income bonds to that amount, was introduced on December 11, 1963, at the request of the governor. It was enacted and published as Ch. 2 of special session Laws of 1963, Jan. 7, 1964.

Bill No. 888, A., to create § 20.550 (9), Wis. Stats., appropriating \$80,000 to Menominee county to assist in paying for operating costs because of an unexpected high level in active TB cases, was introduced on April 16, 1964, by the joint committee on finance at the request of the governor. It was published as Ch. 546, Laws of 1963, on June 2, 1964, effective June 3, 1964.

Bill No. 858, A., directing the state investment board to purchase bonds of the Menominee corporation from the general fund in an amount not exceeding \$3 million in the aggregate.

On Jan. 1, 1964, the income bonds of Menominee Enterprises, Inc., held by members of the Menominee tribe became freely transferable. The statutes [§ 231.45, Wis. Stats.] contained the provision that when the options on the bonds came up, the corporation would have the first option to buy them, and if not purchased by the corpora-

tion, the option would be assigned to the state and could be purchased by the state investment board.

It was reported to the Menominee Indian study committee by Mr. Frederick Sammond, attorney for Menominee Enterprises, Inc., that the corporation was not in a position to buy back the bonds and was interested in assigning its options to the state.

The committee unanimously approved the proposal to direct the investment board to purchase the income bonds in an amount not exceeding \$3 million. This recommendation was introduced as Bill No. 858, A., in the November session of the 1963 legislature by an assembly member of the MISC. The bill passed both houses of the legislature, but was vetoed by the governor because Ch. 2, Laws of 1963 special session, related to a similar problem and could be used by the Menominee.

Scholarships to Wisconsin institutions of higher education for Indians living on taxable lands are supplied through matched state and federal funds and administered by the department of public instruction. The money for this program amounts to \$14,000 each year from the federal government, matched by the state, or \$28,000. The maximum amount that could be given to an applicant was \$600 per year.

### *1965 Legislature*

Bill No. 300, S., restraining the alienation of any bond, stock, certificate of interest, voting trust certificate or other security issued by the Menominee corporation for a period not to exceed 10 years. Menominee Enterprises, Inc., securities become negotiable on Jan. 1, 1966. Consequently,

officials of the corporation issued ballots for the Menominee people to vote on extending this negotiable date for 5 additional years. Of the 327,000 shares among the Menominee, 214,540 voted for the extension. (Each enrolled Menominee owns 100 shares.) Only "yes" votes were requested with the assumption that non-returned ballots represented "no" votes.

The proposal to restrict security sales was approved by the study committee and was introduced amending § 231.45, Wis. Stats. It became Ch. 156, Laws of 1965.

Although restraining the sale of the corporation's securities until 1971, the bill does not prohibit the transfer by will or operation of law upon the death of the owner of any such security, but may provide for an option to the Menominee corporation upon such transfer. If the corporation fails to purchase the security, the state of Wisconsin investment board will be given the same purchasing option.

Bill No. 323, S., relating to an appropriation of \$300,000 to the state highway commission for an emergency highway work program in Menominee county. It became Ch. 395, Laws of 1965.

Bill No. 359, A., relating to state aid to tuberculosis sanatoria. Approved by the MISC, this measure would pay any sanatorium costs over the total amount paid by the county based on a graduated formula. Each county is responsible for its TB costs in the amount of \$500 per million dollars of the county's assessed valuation and the state will pay costs over this figure. Based on tuberculosis costs for 1964, this medical bill would have cost \$99,000, and Menominee county would have received \$67,000 of this fig-

ure. It is primarily a bill for the benefit of Menominee county, but it may benefit about 6 other counties as well.

The bill amends § 50.40 (7) (b), Wis. Stats., and creates § 50.40 (7) (d), Wis. Stats. It became Ch. 419, Laws of 1965, on Dec. 1, 1965.

Bill No. 595, A., became Ch. 287, Laws of 1965, on Sept. 29, 1965. This measure provides for the vocational education of Indian students, the aid not to exceed \$800 per individual student. This would be administered by the state board of vocational and adult education. The purpose of the bill is to provide approximately \$20 per week for room and board for the Indian student while he attends school.

Bill No. 914, A., amends § 20.650 (2) by changing the total amount for Indian college scholarships from \$14,000 per year (from state funds) to *sum sufficient*. The bill became Ch. 285, Laws of 1965, on Sept. 29, 1965.

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No. 187

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**In the Supreme Court of the United States**

OCTOBER TERM, 1967

**MENOMINEE TRIBE OF INDIANS, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
CLAIMS**

---

**SUPPLEMENTAL BRIEF FOR THE UNITED STATES**

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*Solicitor General*

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## **SUPPLEMENTAL BRIEF FOR THE UNITED STATES**

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This supplemental brief is filed in response to the Court's order of January 29, 1968, restoring the case to the calendar for rebriefing and reargument (390 U.S. 916).

We reiterate, without further argument, the principal conclusions stated in our original brief, *viz.*:

(1) That the Treaty of Wolf River of 1854 may fairly be read as granting to the Menominee Tribe a special property interest in the wildlife of the reservation;

(2) That the Termination Act of 1954 did not deprive the tribe of any property right conferred by the treaty; and,

(3) That, accordingly, the United States, having neither taken property from the tribe nor abrogated any treaty guarantee, owes nothing to the Menominees.

Although these propositions, if correct, are fully sufficient to support the judgment below, we did attempt, in our earlier brief, to give a rough definition to the boundaries of the treaty right presently enjoyed by the Menominees. In light of the Court's questions at oral argument, we now elaborate somewhat on that point and also address ourselves for a moment to a question not previously briefed—who are the present and future beneficiaries of whatever treaty hunting and fishing rights survived termination.

#### A. THE SCOPE OF THE TRIBE'S TREATY IMMUNITY FROM STATE REGULATION OF HUNTING AND FISHING

We repeat our original premise: that whatever rights with respect to hunting and fishing were guaranteed<sup>1</sup> by the Treaty of 1854 survive unimpaired today. Accordingly, to determine the present scope of those rights we look to the situation prevailing prior

<sup>1</sup> We share the view of the Wisconsin Supreme Court in *State v. Sanapaw*, 21 Wis. 2d 377, 124 N.W. 2d 41, certiorari denied, 377 U.S. 991 (A. 54-56), and the Court of Claims in the decision under review (A. 9) that it is irrelevant whether the Treaty of 1854 is properly viewed as *conferring* these rights as an incident of a cession of lands to the Indians, or, rather, as *confirming* pre-existing rights which the Indians already enjoyed in lands which they already held and reserved to themselves when they ceded their other lands to the government. At all events, if the treaty is read as encompassing a right to hunt and fish on the reservation lands, there is a guarantee running from the United States to the tribe.



to the effective date of the Termination Act of 1954.

In other circumstances, it would be appropriate to focus directly on the rights guaranteed, measuring them by the language of the grant, the usages of the times, and other indications of the probable understanding of the parties. But that approach is largely foreclosed here. The text of the Treaty of 1854, which does not expressly mention hunting or fishing and confers those rights only by implication, is not illuminating. Nor would it be profitable to probe the intent of the contracting parties with respect to the limits of the rights granted, since the conditions which bring into issue the restrictions imposed by modern conservation laws were doubtless not contemplated in 1854.

That is not to say that the circumstances prevailing at the time of the treaty are wholly irrelevant. On the contrary, it is significant that the Menominees hunted and fished only for their own needs and were not engaged in commercial ventures. While that fact may not entirely preclude some limited sales in the changed conditions of today, it would seem to foreclose any commercial licensing of outsiders to hunt or fish on the reservation lands, and perhaps suggests a quantitative limitation on the Indians' right to take wildlife. Also relevant, we think, are the methods in use in 1854. We do not suggest that the Menominees are not entitled to take advantage of modern improvements in hunting and fishing equipment, but it is doubtful that they can properly invoke the protection of the treaty for wholly new devices whose capabilities for

capturing game is revolutionary by relation to the traditional gear they were using when the grant was made.

Perhaps the most important fact about the treaty guarantee, however, is that it does not include any express immunity from outside regulation of any reservation to the tribe itself of an exclusive right to regulate hunting or fishing. This, we believe, authorizes a definition of the rights conferred in terms of the power of the federal government to restrict their exercise for certain purposes before termination.

It may well be that the State, as the new sovereign exercising jurisdiction over the former reservation lands, does not enjoy the same relationship toward the Indians, and is not technically a successor of the prerogatives of the United States as their guardian before termination. But, in our view, that does not affect the question. The State is entitled, by the express provisions of the Termination Act, to apply its laws to the Menominee lands except only as the Treaty of 1854 grants exemption. And the scope of that exemption or immunity from regulation, it would seem, cannot be broader than it was at the beginning and throughout the century of federal supervision. Thus, to the extent that the United States, after conferring a privilege to hunt and fish, was barred—short of violating the treaty—from curtailing it, there was, and subsists, a true right in the tribe. But, insofar as the federal government could properly regulate the taking of wildlife on the reservation—whether that power was exercised or not—we submit the In-

Indians enjoyed no immunity and can claim none now as against the State.

What, then, was the scope of the federal power to restrict hunting and fishing on the Menominee Reservation before termination? Unfortunately, authoritative precedents are lacking. But that is not really surprising. On the one hand, Congress has undoubted constitutional power to abrogate treaty rights, and, until recently, except as special jurisdictional acts waived sovereign immunity, the issue whether a compensable taking of property rights had occurred could not be litigated. See, *e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-567. On the other hand, as a matter of history, the federal government rarely attempted to exercise any authority over hunting and fishing on Indian reservations, and the one litigated instance involved perhaps excessive administrative regulations promulgated without express congressional sanction. See *Mason v. Sams*, 5 F. 2d 255 (W.D. Wash.).

The matter is governed, we suggest, by two complementary principles, derived from the role which the United States assumed as guardian of the Indians. That responsibility carried with it, first, plenary power to take appropriate measures to protect the interests of the tribe as a whole. *United States v. Kagama*, 118 U.S. 375, 383-384. Most relevantly, the government could manage tribal property for the common benefit of all the members. See, *e.g.*, *Morrison v. Work*, 266 U.S. 481, 485. An aspect of that management, it would seem clear, was regulation of the wild-

life resource of the reservation with a view to its preservation and its equitable distribution among the tribal members. See *In re Blackbird*, 109 Fed. 139, 144 (W.D. Wis.); Department of the Interior, *Federal Indian Law* (1958), p. 498. That is not to say that the United States could properly require the tribe to share its resource with others. But, acting solely in the interest of the tribe, the government could, we believe, impose restrictions on times, places and manner of hunting or fishing which were reasonably calculated to conserve the asset for the members, present and future, and to assure all of them an equal opportunity to enjoy it.

So, also, we submit, the United States was fully empowered—with respect to any tribe under its tutelage—to adopt measures to safeguard the health, morals, or general welfare of the members. See, *e.g.*, *United States v. Sandoval*, 231 U.S. 28. And, toward that end, it seems wholly proper to outlaw or control the use of certain weapons—as dangerous or inhumane—and otherwise to regulate hunting in the interest of safety.

The other principle potentially involved is the duty of the United States, as guardian, to insure that its wards do not injure their neighbors, whether their persons or their property. See, *e.g.*, *United States v. Forty-three Gallons of Whiskey, etc.*, 93 U.S. 188. Of course, the day when “Indian depredations” were feared is long since past. But we suggest that the government still has an obligation, and a corresponding authority—with respect to tribes remaining under

federal supervision—to prohibit or restrict activities on Indian reservations that might impair the rights of others. As applied to hunting and fishing, this may include not only safety regulations, but, more importantly, restrictions designed to protect migratory wildlife which is not confined to the reservation lands. Cf. *Makah Indian Tribe v. United States*, 151 Ct. Cl. 701, certiorari denied, 365 U.S. 879. In such cases, although the Indians could not be required to admit strangers onto their lands to hunt or fish, they might properly be prevented from wholly appropriating or destroying a resource which is only partly theirs.

What we have said of the federal power to regulate the hunting and fishing of the Menominees may be thought to leave little scope to the “rights” guaranteed by the Treaty of 1854, on our assumption that the State is now free to regulate the taking of wildlife on the former reservation lands to the same extent that the United States might have. But there are, we suggest, very significant differences between the hunting and fishing privileges of the Indians in Menominee County and those of other citizens of the State elsewhere.

First, however subject it may be to regulation, the Menominees enjoy a *right* to hunt and fish on their lands, unlike all other citizens who enjoy such a privilege, if at all, only as the State chooses to permit it. Under no circumstances can the State absolutely deprive the Indians of their federal right to take the wildlife of their lands. In this respect, the Menominees enjoy a special status comparable to



those tribes to which federal treaties have guaranteed off-reservation fishing or hunting rights. See Memorandum for the United States as Amicus Curiae in *Puyallup Tribe v. Department of Game*, No. 247, and *Kautz v. Department of Game*, No. 319. One immediate consequence is that they cannot be taxed in their exercise of their rights. *Tulee v. Washington*, 315 U.S. 681.

Moreover,—and in this unlike Indians in whom a federal treaty recognizes only a right to fish or hunt at specified locations “in common with the other citizens of the Territory”—the Menominees cannot be made to share with others the wildlife of their reservation. The tribe cannot be required to admit outsiders to hunt on its lands, nor even to fish in the navigable waters within the former reservation boundaries. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78; *Metlakatla Indians v. Egan*, 369 U.S. 45, 55–56. Nor can the Menominees be compelled to share their wildlife resource with strangers for the sake of “conservation.” While this does not preclude regulation to assure preservation of the asset for the tribe or fair distribution of the resource among its members, conservation measures with a broader goal cannot properly be made applicable to the Menominee lands—subject only to the caveat previously stated for migratory fowl or fish which are not exclusive resources of the Indian lands. In short, the wildlife native to Menominee County belongs to the tribe; it is not an asset of the State. Thus, to suppose an extreme example, it would clearly be impermissible

for the State to set aside a portion of the Menominee lands as a wildlife refuge.

We recognize that the line we have attempted to draw between the core of the treaty right and the area of permissible regulation is not self-executing. But we think it inappropriate to press the matter further—especially in this litigation which involves no challenge to any particular restriction. Moreover, it may well be that an authoritative declaration of the guiding principles will suffice. The State may determine to leave the tribe free to adopt and police itself the measures necessary to conserve and fairly apportion the native wildlife. And if there are problems with respect to migratory birds and fish, it is not unlikely that the State and the tribe can reach agreement on appropriate restrictions once the basic obligation is established.

#### B. THE PRESENT AND FUTURE BENEFICIARIES OF THE TREATY HUNTING AND FISHING RIGHTS

In our view, petitioner has made a persuasive showing that the Termination Act of 1954 was intended to leave the hunting and fishing rights conferred by the Treaty of Wolf River where they were, in the Menominee Tribe.

Certainly, the termination of federal supervision did not necessarily dissolve the tribe. See *Federal Indian Law*, op. cit. supra, p. 464. And, absent express congressional action, the Indians are free to continue their tribal organization, as they have apparently elected to do. Accordingly, there appears to be no bar

to the conclusion of the Court of Claims below that the presently enrolled members of the Menominee Tribe continue to share among themselves whatever hunting and fishing rights were conferred by treaty.

There remains a question as to the future of these rights, assuming the Court deems it appropriate to reach this issue. Because the rights are tribal in nature, it would seem improper to permit their allotment to individuals as property, heritable or assignable. But it does not necessarily follow that the rights terminate upon the death of the presently enrolled members. The closure of the tribal roll for the purpose of distributing trust property need not be viewed as barring the tribe from itself continuing an active membership roll, so long as the tribal organization subsists. See *Federal Indian Law, op. cit. supra*, pp. 414-415. The recent action of the Menominee Tribe suggests, we believe, a permissible solution. The conditions for future membership established by the tribe seem reasonable, although one might question the propriety of viewing as a member for the purpose of exercising tribal hunting and fishing rights an Indian who himself never resided on the tribal lands and has become wholly assimilated in white society.

At all events, we assume the treaty rights to hunt and fish will appertain only to those lands which are held communally and that they will subsist only so long as there remains an identifiable tribal organization with a known membership. Doubtless, in time, those conditions will cease to exist. In the meanwhile, we think it not improper to recognize the continuing force of ancient treaty rights.

For the reasons stated here and in our original brief, we believe the judgment below should be affirmed.

Respectfully submitted.

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APRIL 1968.

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On Writ of Certiorari to the United States  
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**SUPPLEMENTAL BRIEF FOR  
THE MENOMINEE TRIBE**

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**SUPPLEMENTAL BRIEF FOR  
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---

At the oral argument on January 22, 1968, several of the Justices were concerned that the State of Wisconsin was not participating in the oral argument, despite the fact that the State not only had an interest in the outcome, but was the only adversary to the primary position of the Menominee Tribe. Accordingly, on January 29, 1968, the Court ordered that the case be restored to the calendar for rebriefing and reargument, with the State of Wisconsin invited to submit a brief and participate in oral argument.

The call for rebriefing refers to the fact that during the argument of January 22, a number of questions were

asked which were not dealt with at length in the briefs. In response, we have provided herein a Supplemental Statement of Facts, consisting of an analysis of the legislative history of the Menominee Termination Act (pp. 2-9), and a discussion of the Tribe's post-termination activities (pp. 9-13, and see Attachments A and B hereto). We also have presented herein a Supplemental Argument (pp. 13-23), wherein we have attempted to answer, or at least to define our position with respect to the questions raised by the Court.

## SUPPLEMENTAL STATEMENT OF FACTS

### 1. The Legislative History of the Menominee Termination Act

#### a. *The Menominee Tribe Prior to Termination*

In 1854, under the Treaty of Wolf River between the Menominee Tribe and the United States,<sup>1</sup> the Menominee Tribe acquired its reservation in the following terms:

“ . . . the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin . . . . ”

The reservation was part of the territory occupied by the Menominee Tribe since time immemorial,<sup>2</sup> and with one small reduction in 1856,<sup>3</sup> it remained the Menominee

<sup>1</sup> 10 Stat. 1064.

<sup>2</sup> The reservation was entirely within the territorial boundaries claimed by the Menominees in the Treaty of 1831, 7 Stat. 342. However, there is some question whether the northwest corner of the reservation (about a third of the whole) in fact aboriginally belonged to the Chippewas. See 5 Ops. Atty. Gen. 31 (1848), and Royce, *Indian Land Cessions* (1900), Wisconsin Maps Nos. 1 and 2. This matter was adverted to by the Wisconsin Supreme Court, App. 54, but was not considered to be important. We mention it only for the sake of completeness.

<sup>3</sup> See 11 Stat. 679.

Indian Reservation until the Termination Act became effective in 1961.

It contained some 234,000 acres, which was 95% forest lands. Unlike most Indian reservations, the Menominee Reservation was never divided into "allotments," i.e., prorated among the members of the tribe.<sup>4</sup> It remained wholly tribal property until 1961, when it was conveyed intact to the tribal operating company, Menominee Enterprises Inc.

There was a saw mill on the reservation, owned by the United States in trust for the Tribe. The mill employed several hundred Menominees, and processed and marketed the timber from the Menominee Reservation. The median annual income of the Menominees who worked in the mill was \$2,300, while that of those who did not work in the mill was \$650. Some 75 families (out of a total of 477) received welfare.<sup>5</sup>

In 1951 the Tribe was awarded \$8,500,000 in damages as a result of mismanagement of the tribal forest by federal employees.<sup>6</sup> Largely because of this, the Tribe had some \$9,700,000 to its credit in the U.S. Treasury as of October 1, 1953.<sup>7</sup>

Each year the Tribe paid for "all but a small part" of the services provided by the Bureau of Indian Affairs.

<sup>4</sup> *Joint Hearings*, 589, 590.

The full citation to these hearings is *Termination of Federal Supervision over Certain Tribes of Indians*, Joint Hearings before Subcommittees of Senate and House Committees on Interior and Insular Affairs, 83d Cong. 2d Sess. (Feb., Mar. and Apr., 1954). The Supreme Court Library serial number is 10996, *et seq.*

<sup>5</sup> *Joint Hearings*, 590.

<sup>6</sup> The award was by settlement, arising from a number of separate dockets. *Menominee Tribe v. United States*, 121 Ct.Cl. 492 (1952), 118 Ct.Cl. 290 (1951), 117 Ct.Cl. 442 (1950), *app. dism.* 342 U.S. 801; 107 Ct.Cl. 23 (1946); 102 Ct.Cl. 555 (1945); 101 Ct.Cl. 22 (1944); 101 Ct.Cl. 10 (1944).

<sup>7</sup> *Joint Hearings*, 590.

For example, it financed its own tribal law and order system.<sup>8</sup>

The members of the Tribe were those enrolled under the 1934 Enrollment Act.<sup>9</sup> Descendants born thereafter were eligible for enrollment if they were at least one-quarter Menominee blood, whose parents (at least one of whom was an enrolled member) were residents of the reservation at the time of the child's birth.<sup>10</sup> The 1954 final roll showed 3,257 enrolled members.<sup>11</sup>

**b. *Per Capita Bill, 82d Congress***

The Tribe wanted to distribute some of its \$8,500,000 judgment in per capita payments to its members, and accordingly it caused S.2969 and H.R. 7104<sup>12</sup> to be introduced in Congress in 1952. These bills authorized a per capita payment of \$1,000 to each tribal member. The Department of the Interior recommended against passage of the per capita bills, because it wanted the Tribe to commit itself to termination of federal supervision.<sup>13</sup> The 82d Congress adjourned without taking action on the bills.

**c. *Per Capita Bill (H.R. 2828), 83d Congress, 1st Session***

In February, 1953, the per capita bill was reintroduced as H.R. 2828, 83d Congress! This time the Department of the Interior recommended enactment, with the comment that a termination plan should be drafted.<sup>14</sup> The

<sup>8</sup> Id.

<sup>9</sup> 48 Stat. 965, as amended, 53 Stat. 1003 (1939).

<sup>10</sup> Discussed at *Joint Hearings*, 591-593.

<sup>11</sup> See note 48 below.

<sup>12</sup> 82d Cong. 2d Sess. See H.Rept. 2308 (1952).

<sup>13</sup> *Joint Hearings*, 608.

<sup>14</sup> Id. at 609.

bill was duly passed by the House and sent to the Senate.<sup>15</sup>

A tribal delegation met with Senator Arthur V. Watkins of Utah, Chairman of the Subcommittee on Indian Affairs, Senate Interior and Insular Affairs Committee. Senator Watkins advised them that no per capita bill would be enacted unless the Tribe agreed to termination of federal trusteeship.<sup>16</sup> The Indian delegates had no authority to agree to this, so they invited the Senator to visit the Tribe and explain his reasoning to the members, which he did on June 20, 1953. He advised the members that termination was coming whether they liked it or not, and that no per capita bill would be enacted until they agreed to termination.<sup>17</sup> The Tribe by a vote of 169 to 5 agreed to accept termination of federal supervision.<sup>18</sup>

**d. Revision of H.R. 2828, 83d Congress, 2d Session**

Thereafter, H.R. 2828 was redrafted by the Interior Department at Senator Watkin's request,<sup>19</sup> to convert it into a termination bill. Without any hearings being held, the redrafted bill was reported by the Senate Subcommittee<sup>20</sup> and passed by the Senate.<sup>21</sup> The Senate-House conference committee approved the Senate version,<sup>22</sup> but upon Congressman Laird's objection the House refused to pass it.<sup>23</sup>

<sup>15</sup> See H.Rept. 371, 83d Cong. 1st Sess. (1953).

<sup>16</sup> *Joint Hearings*, 594, 609, 695, 99 Cong.Rec. 10940 (1953).

<sup>17</sup> *Id.*

<sup>18</sup> 99 Cong.Rec. 9745 (1953).

<sup>19</sup> 99 Cong.Rec. 10932 (1953); 100 Cong.Rec. 8538 (1954).

<sup>20</sup> See S.Rept. 590, 83d Cong. 1st Sess. (1953).

<sup>21</sup> 99 Cong.Rec. 9746 (1953).

<sup>22</sup> H.Rept. 1034, 83d Cong. 1st Sess. (1953).

<sup>23</sup> 99 Cong.Rec. 10942 (1953). There was extensive debate on the matter. 99 Cong.Rec. 10930-42 (1953).



Early the following year, the Tribe caused its own termination bill to be introduced, S.2813 (and identical H.R. 7135), which met some of the Tribe's objections to H.R. 2828 as passed by the Senate.<sup>24</sup> Hunting and fishing rights were expressly protected in the Tribe's bill.

### *e. Termination Hearings*

Termination of federal supervision over Indian tribes generally was the subject of much attention in 1953 and 1954.<sup>25</sup> The Interior Department drafted a number of termination bills for various tribes, and these were introduced early in 1954.<sup>26</sup> Extensive hearings on these bills, and the Menominee bills, were held in February, March and April, 1954, before a joint committee of the Senate and House Subcommittees on Indian Affairs.<sup>27</sup> The hearings were joint, Senator Watkins said, to avoid the necessity of duplicating the testimony.<sup>28</sup> The hearings opened on February 15, 1954, and reached the Menominee bills on March 10.

After the hearings, a second Senate-House conference considered H.R.2828 again, and approved it,<sup>29</sup> and on June 17, 1954, it became law, in substantially the form as originally redrafted at Senator Watkins' behest.<sup>30</sup> The

<sup>24</sup> *Joint Hearings*, 737.

<sup>25</sup> Termination was a plank of the Republican platform in 1952. 99 Cong.Rec. 10932, 10933 (1953). See also H.Con.Res. 108, 83d Cong. 1st Sess., 67 Stat. B-132 (1953).

<sup>26</sup> All 83d Cong. 2d Sess.: H.R. 7316, Turtle Mountain Band of Chippewas; H.R. 7317, Indians in Western Oregon; H.R. 7318, Sac and Fox and other tribes in Kansas; H.R. 7319, Flatheads of Montana; H.R. 7320, Klamaths of Oregon; H.R. 7321, Seminoles of Florida; H.R. 7322, Indians of California; H.R. 7552, Certain Indians in Nevada; H.R. 7674, Certain Indians in Utah; S.2744, Alabama and Coushatta Indians of Texas.

<sup>27</sup> See full citation to the hearings at note 4 above.

<sup>28</sup> *Joint Hearings*, 1.

<sup>29</sup> H.(Conf.) Rept. 1757, 83d Cong. 2d Sess. (1954).

<sup>30</sup> 68 Stat. 290, 25 U.S.C. §§ 891-902.

deadline for termination of federal supervision was set for December 31, 1958.

It may be noted that in the same year (1954) federal supervision over four other Indian groups was terminated.<sup>31</sup> In 1956 two more groups were terminated,<sup>32</sup> and thereafter two were terminated in 1958, one in 1959 and one in 1962.<sup>33</sup> No tribe has since been terminated.

*f. Amendments to the Menominee Termination Act*

The Menominee Termination Act was amended in 1956 to authorize the federal government to pay for the cost of termination (under the original act the Tribe had to pay).<sup>34</sup> It was amended again the same year to require that the forest be managed on sustained yield principles, to set a deadline on submission of a tribal termination plan, and to authorize the Secretary to convey certain government property to the Tribe.<sup>35</sup>

The Act was amended again in 1958 to require that the Tribe pay some of the termination expenses, and to extend the deadline for termination.<sup>36</sup>

The Act was amended again in 1960 to extend the deadline for termination an additional four months, to April

<sup>31</sup> Klamath Tribes, 68 Stat. 718, 25 U.S.C. § 564; Mixed Blood Utes, 68 Stat. 868, 25 U.S.C. § 677; Paiute Tribes, 68 Stat. 1099, 25 U.S.C. § 741; and Grand Rondes Indians, 68 Stat. 724, 25 U.S.C. § 691.

<sup>32</sup> Ottawa Tribe, 70 Stat. 693, 25 U.S.C. § 841; Wyandotte Tribe, 70 Stat. 893, 25 U.S.C. § 791.

<sup>33</sup> Peoria Tribe, 70 Stat. 937, 25 U.S.C. § 821 (1958); Certain California Rancherias, 72 Stat. 619 (1958); Choctaw Tribe, 73 Stat. 420 (1959); Ponca Tribe, 76 Stat. 429, 25 U.S.C. § 971 (1962).

<sup>34</sup> 70 Stat. 544, see H.Rept. 2235 and S. Rept. 2411, 84th Cong. 2d Sess. (1956).

<sup>35</sup> 70 Stat. 549, see H.Rept. 2246 and S.Rept. 2412, 84th Cong. 2d Sess. (1956).

<sup>36</sup> 72 Stat. 290, see H.Rept. 1013, S.Rept. 1116, 85th Cong. 1st Sess., and H.(Conf.) Rept. 1866, 85th Cong. 2d Sess. (1958).

30, 1961.<sup>37</sup> This deadline was met, and on April 26, 1961, the Secretary proclaimed the end of federal supervision.<sup>38</sup>

*g. The Tribe's Plan of Termination*

Shortly after the Menominee Termination Act was enacted in 1954, the Tribe set out to piece together a plan of termination which would meet with the approval of the State and Federal governments. The plan finally adopted<sup>39</sup> was that the reservation would become a county under the organic laws of Wisconsin, with the same type of municipal government as the other counties in Wisconsin. Wisconsin laws and court jurisdiction already applied to the reservation under Public Law 280<sup>40</sup> (which, it may be noted, expressly exempted hunting and fishing rights from state regulation).

A stock corporation, called Menominee Enterprises Inc., would be formed, and the Menominee forest and the saw mill would be transferred from the United States to the stock corporation.<sup>41</sup>

The corporation's stockholders would be the 3,270 Menominees on the final roll, each of whom would receive 100 shares of common stock, par value one dollar. Their voting rights would be exercised by a voting trust, whose trustees would include four Menominees and three non-Indians. Each Menominee would also receive a 4% income bond with a face value of \$3,000. The corporation's

<sup>37</sup> 74 Stat. 867. See H.Rept. 1824, S.Rept. 1907, 86th Cong. 2d Sess. (1960), and see 1960 Amendments to the Menominee Indian Termination Act, Hearings on H.R. 11813, Before Subcommittee on Indian Affairs, Senate Committee on Interior and Insular Affairs (August 16 and 17, 1960).

<sup>38</sup> 26 Fed.Reg. 3726.

<sup>39</sup> Published at 26 Fed.Reg. 3726-3755 (1951).

<sup>40</sup> 18 U.S.C. § 1162, 28 U.S.C. § 1360; 67 Stat. 588 (1953), amended to apply to Menominee Reservation, 68 Stat. 795, S.Rept. 2223, H.Rept. 2322, 83d Cong. 2d Sess. (1954).

<sup>41</sup> 26 Fed.Reg. 3728.

board of directors initially was to include four Menominees and five non-Indians.<sup>42</sup>

The interests of minors, persons non compos mentis, and those otherwise deemed in need of assistance, would be owned by the First Wisconsin Trust Company as trustee.<sup>43</sup>

The stock (represented by voting trust certificates) was subject to restrictions designed to keep it in Indian hands. The Corporation, and then the State of Wisconsin, had a right of first refusal in the event of a proposed sale.<sup>44</sup> The restrictions were to run until January 1, 1981.<sup>45</sup>

The bonds, due December 1, 2000, were also subject to restrictions.<sup>46</sup> The corporations could sell land for a residence to a bondholder and accept the bond as payment.<sup>47</sup>

The membership roll was brought up to date and the final roll was approved by the Secretary of the Interior and published on December 12, 1957.<sup>48</sup> It contained 3,270 names.

## **2. Post-Termination Activities of the Tribe**

### **a. Formation of the Tribal Corporation**

Since termination of federal supervision, the Tribe has continued to meet and make decisions as a tribe, and has held itself separate and distinct from Menominee Enterprises Inc., which was the holding and operating entity. In 1962 the Tribe's members set up a membership

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<sup>42</sup> Id. at 3729 and 3728.

<sup>43</sup> Id. at 3728.

<sup>44</sup> Id. at 3736.

<sup>45</sup> Id. at 3737.

<sup>46</sup> Id. at 3742.

<sup>47</sup> Id. at 3745.

<sup>48</sup> 22 Fed.Reg. 9951 (1957).

corporation under the laws of Wisconsin (see Articles, pp. A1-A11 below). The background to the tribal corporation is as follows.

On March 17, 1962, there was a meeting of the "Menominee Tribal Members" (p. B1 below). The Chairman, Lawrence Richmond, a member of the Tribe (like all others quoted in this section), explained the purpose of the meeting (p. B3):

"The proposed plan for your consideration involves organizing a non-profit, non-stock corporation composed of tribal members, through a voluntary membership basis in the organization. Basically, the new organization is designed to provide for the re-establishment of the Menominee Indians of Wisconsin, to protect and preserve their identity, their cultures, customs, traditions, legends, language, crafts and to reserve such other inherent rights from former treaties with the United States and for other purposes."

Al Dodge said (p. B3) "... at the present time we are under State authority, but our inherent rights from our ancestors and forefathers are in jeopardy, such as fishing and hunting, trapping; and that we inherited ownership of these rights which the State now is attempting to take away. Thus through this type of group organization we can be able to assert ourselves to interested parties and officials [sic]."

The minutes record that "The Chairman indicated that this new organization should not be confused with the Enterprise, that it was separate, and, this is a group of Menominees, for Menominees, where complaints could be registered legally." (p. B4).

The proposal to form a membership corporation was adopted by a vote of 94 to 0 (p. B6), and a drafting committee was elected.



On March 21, 1962, the drafting committee met. Hilary Waukau said he believed that (p. B9):

"... many of the documents already in existence stated in broad terms many of the "inherent rights" and that this organization should look toward spelling out the specific rights, especially in the areas of hunting and fishing."

On May 9, 1962, the General Council of the Menominee Tribe<sup>49</sup> met and approved the Articles of Incorporation and Bylaws of the "Menominee Indian Tribe of Wisconsin, Inc." The Articles are fully reprinted below, pp. A1-A11.

These articles generally preserve the traditional structure of the Tribe under its 1928 constitution. It is a non-profit membership corporation under the laws of Wisconsin. There are members and associate members; members under 21 years of age and associate members are not allowed to vote (pp. A8-A9). A quorum of 75 is required at meetings of members (same as under the 1928 tribal constitution); and the 12-man board of directors is called the Council of Chiefs (under the 1928 tribal constitution it was called the Advisory Council) (p. A6).

The corporation became effective on May 9, 1962, when the Articles were filed with the Secretary of State of Wisconsin.

#### ***b. Meetings of the Tribal Corporation***

The Council of Chiefs met on June 6, 1962, to discuss an opinion by Wisconsin Attorney General Reynolds that the Menominees were now subject to state hunting and fishing regulations. It was resolved to ask the Board of Directors of Menominee Enterprises Inc. to contest this opinion (pp. B10-B11).

<sup>49</sup> This is the traditional Menominee governing body, composed of all adult members of the Tribe, roughly equivalent to a New England town meeting.

At another meeting (date unknown) the Council of Chiefs called for a "mass meeting" on the hunting and fishing situation (pp. B11-B12), which was held on October 12, 1962 (pp. B12-B13). The meeting voted to authorize (pp. B15-B16):

"... the Menominee Indian Tribe of Wisconsin, Inc. to commence such legal action necessary or otherwise, in the Federal Courts of the United States, seeking a remedy from the adverse opinion rendered by the Attorney General of Wisconsin relating to hunting, fishing and trapping rights the Menominees declare as inherent property rights, which opinion denies these rights. . . ."

The members of the Menominee Tribe of Wisconsin, Inc., met on March 16, 1968 (p. B17), and by a vote of 100 to 4 changed the rules on membership in the Articles of Incorporation to include all members' descendants who met the criteria of the Enrollment Act of 1934;<sup>50</sup> that is, to include descendants with at least one-quarter Menominee blood, one or both of whose parents resided on the Menominee Reservation at the time of the descendant's birth.

The members also adopted resolutions calling for updating the tribal roll annually (p. B18), continuing the policy of sound game and fish conservation practices (p. B19),<sup>51</sup> forbidding commercial transactions in connection with exercise of tribal hunting and fishing rights (p. B19), and defining those persons entitled to exercise

<sup>50</sup> 48 Stat. 965, as amended, 53 Stat. 1003, see note 9 above.

<sup>51</sup> The Menominees have long been concerned with conservation. In 1948 a bill was introduced in Congress authorizing the General Council to adopt a hunting and fishing code for their reservation, and making violation of the code a federal misdemeanor. H.R. 5300, 80th Cong. 2d Sess. On November 12, 1957, the tribal Advisory Council established a conservation court and certain conservation ordinances, which in view of impending termination were never put into effect.

the rights (p. B18). The latter resolution reads as follows:

"All tribal members, as defined in Article X of the Articles of Incorporation, Section 1(a), and only such members, shall have the right to exercise tribal hunting and fishing rights, subject to tribal regulations;

"PROVIDED, HOWEVER, that any member who violates any tribal hunting or fishing regulation may upon finding of the Council of Chiefs be declared ineligible to exercise such rights, for such period of time as the Council of Chiefs may specify."

It is noted that upon a declaration of ineligibility, the member would be fully subject to State hunting and fishing regulations, including license fees, seasons and bag limits.

### SUPPLEMENTAL ARGUMENT

#### 1. Discussion in Response to Questions Raised by the Justices

##### a. *The Tribe Still Owns the Rights*

Several of the Justices wanted to know who owns the hunting and fishing rights now. The Tribe? Menominee Enterprises, Inc.? We think it is clear that the Tribe owns the rights, simply because it never lost them. The Government argued below (but not here) that the Tribe was extinguished, but as we show at pp. 16-19 below, the Tribe survives. Its sovereignty as a political entity may have been curtailed, and its most valuable property, the forest, has been transferred to Menominee Enterprises Inc. But as shown at pp. 9-13 above, the Tribe continues as a real entity—it has incorporated itself as a membership corporation, it holds General Council meetings, it makes decisions affecting its welfare, and it owns and supervises its property including its hunting and fishing rights.

Mr. Justice Fortas's tentative impression was that Menominee Enterprises Inc., not the Tribe, would own any hunting and fishing rights, because the Act contemplated that all tribal property was to be conveyed to Menominee Enterprises. This is not so. The Act provides for the conveyance to Menominee Enterprises of "... the title to all property, real and personal, *held in trust by the United States* for the tribe."<sup>52</sup> (Emphasis added.) I.e., only *trust* property was to be conveyed.

The hunting and fishing rights are not included in that trust property; they are rights to engage in certain conduct without outside interference. Title was never in the United States, but was always in the Tribe, by aboriginal user prior to 1854, and thereafter by treaty guarantee as well. The United States could not convey such rights to Menominee Enterprises or anyone else, because the United States did not have legal title to them. The rights are inherently inconsistent with any supervisory powers in the United States, and as we show at pp. 19-20 below, the United States did not have the authority to interfere with the use and enjoyment of these rights, at least not without paying just compensation. So far as we know, the United States did not consider these rights to be part of the trust corpus, and the two deeds by which the tribal property was transferred to Menominee Enterprises, Inc. are silent with respect to hunting or fishing rights.<sup>53</sup>

By way of analogy, we note that the Quinault Tribe of Washington (a non-terminated tribe) sells fishing licenses to sportsmen, and retains the proceeds in its own unre-

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<sup>52</sup> 25 U.S.C. § 897.

<sup>53</sup> App. 6-7.

<sup>53</sup> The deeds are dated the same day as the Secretary's proclamation, April 26, 1961, 26 Fed.Reg. 3726; they are not published as an attachment thereto, though the covenants in the deed conveying forest land appear at p. 3729. One deed conveys forest land, and the other conveys non-forest land. The language of the proclamation is the same as the Act, referring only to conveyance of *trust* property.

stricted bank account, over which the United States exercises no trust supervision. Likewise, the Tribe buys steel-head salmon from its members, and ships them across the State of Washington, where sale is illegal, to Oregon, where sale is legal. This has been upheld.<sup>54</sup> These proceeds also go into the Tribe's own unrestricted bank account. If the United States regarded the Quinault fishing rights as trust property, the proceeds logically would go into the tribal trust account, like proceeds from sale of tribal lands.

### ***b. The Scope of the Rights***

What is the scope of the rights with respect to intensity of use? It would be presumptuous for us to attempt to voyage too far into uncharted seas, but certainly as a minimum, the rights would include the right to hunt and fish to the extent practiced in 1854. That is, to catch at least all the deer, trout, etc. necessary to feed one's family, and to barter for other commodities. We need claim no more in this case, for the Indians whose arrest originally gave rise to this litigation were not shown to have been hunting to any extent in excess of the minimum suggested. We note that the kind of fish and game found on the Menominee Reservation is not readily subject to commercial exploitation on any large scale. We would, however, argue against restricting the rights to aboriginal methods such as bow and arrow, because any legitimate public interest in restricting the rights centers on quantity, not method.

With respect to the duration of the rights, we would concede that the rights are peculiarly Indian in nature, and arise out of Indian culture and traditions, and would therefore not outlast the Menominee Tribe as an Indian entity. We do not presume to suggest what sociological, ethnological, or other factors might constitute the termination of the Tribe as an Indian entity, but are confident that when that day appears to have arrived, a court will

<sup>54</sup> *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557 (1930).



be able to cope with the problem, as it does other complex matters.

With respect to geographic extent, we would concede that the rights are limited to the boundaries of the 1854 reservation.

With respect to the alienability of the hunting and fishing rights, we would concede that the rights, to the extent they constitute an immunity from state regulation, may not be conferred on a non-Indian. It is settled law that a non-Indian remains subject to state hunting and fishing regulations when he comes on an Indian reservation.<sup>55</sup> We would note, however, that identification as an Indian is not, or at least should not be, necessarily a matter of blood quantum, but may arise from affiliation with a tribe on a permanent basis and practicing its customs and sharing its community life.<sup>56</sup> In other words, the Tribe, if it wished, could adopt as members persons without Indian blood who fit the above criteria.<sup>57</sup> On the other hand, we would not expect a court to recognize the immunity of a person who did not in any sense meet those or similar criteria, whether or not the Tribe had declared him to be a member.

## 2. The Termination Act Did Not Extinguish the Tribe

Several of the Justices asked questions the answers to which depended on whether the Tribe as such has been extinguished. The Court of Claims below held that the Act contemplated a continuation of the Tribe. The Court said:<sup>58</sup>

"It is clear from the wording of the various sections of the Termination Act itself that it was contem-

<sup>55</sup> *Draper v. United States*, 164 U.S. 240 (1896); *Ex parte Crosby*, 38 Nev. 389, 149 Pac. 989 (1915); *Federal Indian Law*, 324-325.

<sup>56</sup> For a discussion of the definition of an "Indian," see *Federal Indian Law* 4-12.

<sup>57</sup> A tribe has the authority to define its membership. *Federal Indian Law* 90, 43-44, 414, 419.

<sup>58</sup> App. 6-7.

plated the Menominee tribe would continue in existence after the Act became effective. . . . The Termination Act did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the tribe."

We think a fair reading of the face of the statute compels the conclusion reached by the Court of Claims. The very title of the Act explains that it is an act "To authorize the withdrawal of the Menominee Tribe from Federal jurisdiction."<sup>59</sup> This is not language terminating the Tribe; it is merely language cancelling federal responsibilities.

The authoritative government textbook, *Federal Indian Law*, states:<sup>60</sup>

"Termination of tribal existence is to be distinguished, of course, from termination of Federal supervision of various tribes as provided by recent acts of Congress. Development of the Indians' property to full utilization, and encouragement of the Indians to accept responsibility for its management, are the proper goals of Indian administration rather than continued Federal protective guardianship. They are the means by which the United States, within a reasonable time, may withdraw from its historic role and terminate its trusteeship. *Whether or not the Indians concerned thereafter continue to live in tribal relationship, will be a matter for them to decide.*" (Emphasis added.)

<sup>59</sup> 68 Stat. 250 (1954). See also Section 1 of the Act, which declares that the purpose is "to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."

<sup>60</sup> Department of the Interior, *Federal Indian Law*, 464 (1958). See also, pp. 464-468, concerning the many attempts by Congress to terminate a tribe which have proved "abortive," and see p. 468: "They [Congressional attempts] also point to the reasons for the judicial rule that an exercise of the Federal power to dissolve a tribe must be demonstrated by statutory or treaty provisions which are positive and unambiguous."

At the hearings on the termination bills in February, 1954, Representative d'Ewart stated (referring to the Klamath bill) : <sup>61</sup>

"This bill contemplates, though, that the tribe as an entirety shall go on after the enactment of this legislation and the division of the assets."

And Associate Commissioner of Indian Affairs H. Rex Lee replied:

"Well, it would be entirely up to the Indians as to whether they wanted to go on as a tribe, or what they wanted to do."

And Bureau of Indian Affairs Program Counsel Lewis Sigler added: <sup>62</sup>

"So far as the drafting of this bill is concerned, though, it was our intention to avoid any express statement that would suggest that the tribe would cease to exist as a tribal entity."

It is true that the foregoing colloquy was addressed to the Klamath termination, not the Menominee termination, and the two situations were not precisely identical. One difference was that the Menominees elected that their trust property be owned and managed by their own stock corporation, whereas the Klamaths elected that their trust property be owned and managed by an outside trustee, the United States National Bank of Portland. Another difference was that the Klamaths were given the opportunity to withdraw from the tribe and be paid their share of the tribal estate (i.e., individual termination),<sup>63</sup> whereas the Menominees did not have this option. But basically the two situations were the same, and the fore-

<sup>61</sup> *Joint Hearings*, 253.

<sup>62</sup> *Id.* at 255.

<sup>63</sup> 25 U.S.C. § 564(d)(2). Pursuant to this clause, about 78% of the Klamath members withdrew, and received over \$40,000 each. Having withdrawn from the tribe they have no further tribal rights, such as the hunting and fishing rights. Most of the withdrawers are destitute today.

going colloquy reveals an intent which applies to the Menominees the same as to the Klamaths.

The Menominee roll was of course closed by the Termination Act,<sup>64</sup> but that is frequently done by Congress when tribal property is to be distributed, and by itself has nothing to do with whether a tribe is at the same time being terminated.<sup>65</sup> As *Federal Indian Law* says, "These [final rolls] may be final for the purpose of distributing tribal property but not for the purpose of controlling internal tribal functions."<sup>66</sup>

If Congress had intended to terminate the Tribe, and designate Menominee Enterprises as its successor, it had only to say, as it did in the Choctaw Termination Act, that the legal entity set up by the tribe "shall be the successor in interest to the Choctaw Tribe for all purposes."<sup>67</sup>

### 3. Prior to Termination the United States Had No Authority to Restrict the Tribe's Aboriginal Hunting and Fishing Customs

One of the Justices asked to what extent the United States prior to termination could restrict the Tribe's hunting and fishing rights, which would throw some light on what authority the State now has in that regard.

<sup>64</sup> 25 U.S.C. § 893.

<sup>65</sup> For example, under 34 Stat. 539 (1906) Sec. 1, the Osage roll was closed and all tribal property (land and mineral rights) divided among the enrollees. The Osages are very much a tribe today. See also 34 Stat. 1035 (1907), amended 41 Stat. 16, with respect to the Blackfeet Tribe, also very much alive today. The Confederated Salish and Kootenai Tribes of the Flathead reservation had a "final roll" prepared under the general authorization of 25 U.S.C. § 162, 163; see special legislation Act of May 31, 1924, 43 Stat. 246; yet those Tribes were the first to organize under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and continue to own substantial and important properties. Cf. *Montana Power Co. (Confederated Tribes, Intervenor) v. F.P.C.*, 298 F.2d 335 (D.C. Cir. 1962).

<sup>66</sup> At pp. 414-415.

<sup>67</sup> 73 Stat. 420, 422 (1959).

Our position is that prior to termination, the United States had no authority as guardian to interfere with the Tribe's aboriginal hunting and fishing customs, because they were not ordinary conduct, but were conduct freedom to practice which was guaranteed by treaty.

Such few cases as there are seem to recognize this concept. For example, in *Mason v. Sams*,<sup>68</sup> the court held that the Secretary of the Interior had no authority to regulate fishing by the Quinault Indians on their own reservation. In *United States v. Cutler*,<sup>69</sup> the court held that the Migratory Bird Act restrictions did not apply to a Shoshone Indian hunting on his own reservation. Incidentally, in neither of those cases did the treaty expressly protect hunting and fishing rights inside the reservations.<sup>69a</sup>

But even if we are wrong, and the federal government did have some authority under its role as general guardian of the Tribe, to supervise the Tribe's hunting and fishing, the State would not have the same authority, because the State has no role as guardian to protect the ward from mismanagement of his property.

We are aware, of course, that Congress had (and still has) the constitutional power to impose restrictions,<sup>70</sup> but to the extent the exercise of that power reduced vested treaty rights, it would give rise to an obligation to pay just compensation.<sup>71</sup> The State of Wisconsin would not have this power, because the right arises from an unabrogated federal treaty, with which the State cannot interfere.

<sup>68</sup> 5 F.2d 255 (W.D. Wash. 1925).

<sup>69</sup> 37 F.Supp. 724 (D. Ida. 1941).

<sup>69a</sup> The *Cutler* court assumed, apparently erroneously, that the Shoshones' express off-reservation hunting rights applied inside the reservation.

<sup>70</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Federal Indian Law*, 499 (1958).

<sup>71</sup> *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937).



#### 4. Supplemental Material Bearing on the Argument That The Termination Act Did Not Abrogate the Treaty Right to Hunt and Fish

Further research into the termination hearings has revealed certain colloquies which further support our argument (main brief, p. 20) that the Menominee Termination Act did not abrogate tribal hunting and fishing rights.

In the hearings on the Flathead Termination bill, which took place February 25, 26 and 27, 1954 (shortly before the Menominee bills were reached on March 10), Senator Mansfield expressed concern that the Indians' Treaty rights would be fully protected. Mr. H. Rex Lee (Associate Commissioner of Indian Affairs) replied:<sup>72</sup>

"I might say at this point that the Commissioner felt very strongly that we should put nothing in any of these bills or make any proposal that would violate any Indian treaty. And he specifically gave his entire staff that instruction."

And in the hearings on the Klamath Termination bill, February 23 and 24, 1954, a colloquy occurred,<sup>73</sup> clearly reflecting an understanding that hunting and fishing rights would not be abrogated. This colloquy is fully reprinted as Attachment C below, pp. C1-C2. The following excerpts are enough to convey its sense:

"[By Associate Commissioner of Indian Affairs, H. Rex Lee:] Now, in terms of the fishing and hunting rights, I think that is a little different. I can anticipate a little difficulty on the part of the local officials out there maybe 25 or 50 or 75 years from now, trying to determine who has hunting and fishing rights.

<sup>72</sup> *Joint Hearings*, 890.

<sup>73</sup> *Id.* at pp. 254-5.

"Senator WATKINS.—I would suggest that possibly it might be a good idea for the United States to buy out that so-called right to pay them off, because then you would not have difficulty with the white people in those areas. If we go on 25 or 50 years from now and we have a large increase in Indians, and they have just a trace of Indian blood, and claim that 'as a descendant of so-and-so, I claim the right to fish and hunt'—there would be the question of who did have the right to fish and hunt. Under those circumstances, it might pay to negotiate it with them to buy it out, pay them off completely, and put them all on the same basis.

\* \* \* \*

"Mr. LEE. I would certainly agree with you that it is worth exploring, that is, the possibility of buying out those rights. I think that is something that you people have to consider and decide on.

"We have this proviso in here simply because we do have a treaty obligation, and we have no authority at the present time to work out from under that. ~~Neither do we want to be in a position of recommending that a treaty right be violated.~~ But if the Congress decides that they would like to try and commute this treaty right and make a lump-sum payment for it, then we would have to go back and negotiate with the Indians to see whether or not such a settlement were possible or satisfactory."

The foregoing colloquy shows that the speakers assumed that the Klamaths had treaty hunting and fishing rights which the Tribe would continue to own after termination of federal supervision. Note that the speakers made no distinction between hunting and fishing rights, though the Klamath Treaty expressly protected only fishing rights.<sup>74</sup> As later litigation revealed, the Klamath treaty did protect hunting rights as well as fishing

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<sup>74</sup> This point is discussed in our main brief, pp. 19-20.

rights.<sup>75</sup> The Menominee hunting and fishing rights stand on the same footing as the Klamath hunting rights.

As to the Menominee Termination Act, Senator Watkins, the father of the bill, said upon the occasion of the signing of the bill,<sup>76</sup>

"The bill in no way violates any treaty obligation with this tribe."

### CONCLUSION

For the foregoing reasons the judgment of the Court of Claims below should be affirmed on the rationale that the Menominee Tribe survives and still owns its hunting and fishing rights.

Respectfully submitted,

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April 8, 1968.

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<sup>75</sup> *Klamath & Modoc Tribes v. Maison*, 139 F.Supp. 634 (D.Ore. 1956), and *State v. Pearson* (Klamath County District Court, 1961, unreported; reprinted at p. 70 of our petition for certiorari), both cases discussed in our main brief, p. 19.

<sup>76</sup> 100 Cong. Rec. 8538 (1954).

## ATTACHMENT A

## PLAN FOR THE ORGANIZATION OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN UNDER A NON-PROFIT, NON-STOCK CORPORATION

## STATEMENT OF THE PLAN AND DECLARATION OF ITS OBJECTIVES, GOAL AND CONTINUITY OF PURPOSE

The new policy of the Congress of the United States relating to the American Indians was declared in H.R. Concurrent Resolution 108, 83rd Congress, 1st Session (August 1, 1953) which instructed the Secretary of the Interior to recommend legislation for the withdrawal of federal supervision over certain American Indian Tribes, included among them the Menominee Indians. As a result of this mandate, Congress enacted P.L. 399-83rd Congress, Chapter 303-2nd Session, approved June 17, 1954, as amended, became the Menominee Termination Act, which effectively terminated the Menominees on April 30, 1961.

As termination became a reality, plans for meeting the problems were advanced in some degree in the establishment of a business corporation called Menominee Enterprises, Inc., which corporation would take title to all properties of the Menominees for management. Those people in need of assistance and minors' assets were transferred for administration to a trust company. These actions were consummated by the Secretary of the Interior under terms of the termination act.

Principally, termination involves the Menominee Indian reservation now Menominee County, comprising 233,902 acres of land with major assets in the form of timber holdings, sawmill, recreational lands and waters and tribal funds, along with interests of 3,270 enrolled members of the tribe.

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\* Errors herein appear in the original.

Another feature arising from termination was the creation of the 72nd county in Wisconsin, out of the former Menominee Indian Reservation area by the Wisconsin State Legislature. The move was to integrate into local government under the structure of State Statutes. In the same legislation creating the county, a proviso was enacted to limit the life of the County until July 31, 1965, at which time the Legislature may evaluate the success or failure of the local government.

The termination act does not provide ways and means to protect and preserve important tribal heritage. Therefore, the only avenue known to the Menominee Indians to accomplish and perpetuate the rich heritage handed down to us is to form an organization such as contemplated herein. In a special meeting of the Menominee Indian people convened at Neopit, Wisconsin on March 17, 1962 a resolution was unanimously adopted approving the establishment of a non-profit, non-stock corporation under the laws of the State of Wisconsin, to reestablish the Menominee Indian Tribe of Wisconsin, to preserve their identity, and to protect and preserve tribal customs, traditions, cultures, legends, language, crafts, and to reserve such other inherent rights from former treaties between the United States and the Menominee Indians and for other purposes.

The Treaties referred to are as follows:

Treaty of March 30, 1817 (7 Stat. 153; proclaimed December 26, 1827) A treaty of peace and friendship concluded at St. Louis.

Treaty of February 8, 1831 (7 Stat. 342) A treaty of cession concluded at Washington, D.C.

Proclamation of February 17, 1831 (7 Stat. 346; proclaimed July 9, 1832) Ratifying treaty of February 8, 1831.



Treaty of September 3, 1836 (7 Stat. 506; proclaimed February 15, 1837) A treaty of cession concluded at Cedar Point.

Treaty of October 18, 1848 (9 Stat. 952; ratified January 23, 1849) A treaty of cession concluded at Lake Powaw-hay-kon-nay.

Treaty of May 12, 1854. (10 Stat. 1064; proclaimed August 2, 1854) A treaty of cession and establishment of Menominee Reservation.

Treaty of February 11, 1856. (11 Stat. 679; ratified April 18, 1856 proclaimed April 24, 1856) A treaty of cession concluded at Keshena.

In addition, the organization shall provide for the protection and preservation of all natural resources of the Menominee Indians, including water, soil, fish and wildlife.

The transition from federal trusteeship of the tribe into the main stream of American life, the members being inadequately prepared, has developed many new social and economic problems. The obstacles and difficulties encountered in a rapid program of adjustment is seriously affecting many Menominee families and will continue for some time. These and many other problems, calls for solution and prompts attention by tribal members to form a legally constituted organization that will provide the leadership and service to the Menominee people. Termination success is unknown at this stage, but through an organized group, we may in the future assert and properly assess termination problems and take concerted action.

The Menominee Indians in establishing the non-profit, non-stock corporation shall preserve the rich heritages of the past, and with the help of Almighty God, may unite and take their rightful place, with honor, among the many organizations of our county, dedicated to the noble purposes for the common good.

**MENOMINEE INDIAN TRIBE OF WISCONSIN, INC.  
ARTICLES OF INCORPORATION AND BY-LAWS  
ADOPTED BY MENOMINEE TRIBAL MEMBERS,  
MAY 9, 1962 AT NEOPIT  
WISCONSIN, MENOMINEE COUNTY**

**PREAMBLE**

We, the members of the Menominee Indian Tribe of Wisconsin, whose names appear on the final roll, pursuant to the Act of June 17, 1954 (68 Stat 250) said roll approved by the Secretary of the Interior on November 26th 1957, and proclaimed in the Federal Register at Washington, D.C. in Volume 22, on December 12, 1957, do hereby band together under guidance of Almighty God, to secure to ourselves and our descendants the rights and benefits to which we are entitled under the laws of the United States, the several states thereof, to promote a better understanding and relationship with our fellow citizens of Wisconsin; to re-establish the Menominee Indian Tribe of Wisconsin; to preserve their identity; to protect and preserve tribal customs, traditions, cultures, legends, language and crafts; to reserve such other inherent rights from former Menominee treaties or agreements with the United States; to promote the common welfare of the Menominee Indian Tribe and its members and for other purposes consistent with law and to foster the continued loyalty and allegiance of the Menominee Indian Tribe to the United States and the flag of our country, to these objectives, we dedicate this organization.

**ARTICLES OF INCORPORATION  
OF  
MENOMINEE INDIAN TRIBE OF WISCONSIN, INC.  
(Date May 9, 1962)**

The undersigned individuals designated as Incorporators, who are members of the Menominee Indian Tribe,

for the purpose of forming a Wisconsin corporation under Chapter 181 of the Wisconsin Statutes, do hereby adopt the following Articles of Incorporation:

## ARTICLE I

### NAME AND HEADQUARTERS

The name of the corporation is Menominee Indian Tribe of Wisconsin, Inc., with headquarters in Neopit, Wisconsin.

## ARTICLE II

### PERIOD OF EXISTENCE

The Menominee Indian Tribe of Wisconsin, Inc., shall be in existence for ten years, beginning on date of filing. At end of the ten years the corporation may extend such life or dissolve the same by vote of the majority of the members assembled at the Menominee Indian Tribal Convention. Notice must be made in writing by the Principal Chief informing all registered members at least sixty days prior to expiration date that consideration and action be taken on the issue contained in this article.

## ARTICLE III

### PURPOSE

The purpose for which this corporation is organized is to engage in any lawful activity within the purposes for which corporation may be organized under the Wisconsin Non-Stock, Non-Profit Corporation Law, subject to the limitations applicable thereof. The corporation shall manage and operate all of the businesses and properties, real and personal, acquired by it and that its purposes shall include those defined and enumerated in the Preamble.

## ARTICLE IV

### NON-STOCK

The corporation is constituted without any capital stock and no authority is herein granted for issue of any stock in this corporation.

## ARTICLE V

### REGISTERED AGENT AND ADDRESS

The name of the initial Registered Agent of the corporation is Atlee A Dodge and the registered office is Neopit, Wisconsin.

## ARTICLE VI

### ANNUAL MENOMINEE INDIAN TRIBAL CONVENTION

There shall be an annual convention of the members of the Menominee Indian Tribe of Wisconsin, Inc., the place and time to be determined by the Council of Chiefs before adjournment of the annual convention.

## ARTICLE VII

### QUORUM OF MEMBERS TO CONVENTION

At least seventy-five accredited members of the corporation entitled to vote represented in person or by proxy, shall constitute a quorum at any meeting.

## ARTICLE VIII

### COUNCIL OF CHIEFS

The business and affairs of the corporation shall be managed by the Council of Chiefs, which shall consist of

twelve (12) Chiefs, who shall be members of the Menominee Indian Tribe appearing on the "Final Roll" and be a certified member of this organization; at the first annual Menominee Indian Tribal Convention, there shall be elected twelve (12) Chiefs, the six (6) receiving the highest number of votes will serve for a two year term of office and the six (6) receiving the next highest number of votes will serve for a one year term of office, and thereafter, annually, there shall be six Chiefs elected at the Menominee Indian Tribal Convention for a two year term. All such members elected shall serve until their terms are completed. Any vacancy occurring in the Council of Chiefs shall be filled with the next succeeding annual election of the Council by the affirmative vote of a majority of the Chiefs then in office, Each member of the Council of Chiefs will have one vote.

The initial Council of Chiefs, who shall serve until the first annual Menominee Indian Tribal Convention shall be as follows:

NAME	ADDRESS
1. Al Frechette	Neopit, Wisconsin
2. Atlee A. Dodge	Neopit, Wisconsin
3. Gordon Dickie	Keshena, Wisconsin
4. Al Dodge	Neopit, Wisconsin
5. Lawrence Richmond, Jr.	Neopit, Wisconsin
6. James G. Frechette	Keshena, Wisconsin
7. Glenn Besaw	Neopit, Wisconsin
8. Lawrence Richmond, Sr.	Neopit, Wisconsin
9. George W. Kenote	Neopit, Wisconsin
10. Hilary Waukau	Neopit, Wisconsin
11. John M. Boyd	Keshena, Wisconsin
12. Melvin Chevalier	Neopit, Wisconsin



## ARTICLE IX

## NOMINATION AND ELECTION OF OFFICERS

SECTION 1. *Nominations.* Nominations for Principal Chief, First Vice-Chief, Recording Secretary and a Treasurer shall be made from the floor of the Convention. Only enrolled Menominee Indians shall qualify for nomination and election. The four officers designated herein shall be elected from the Council of Chiefs.

SECTION 2. *Elections.* The Principal Chief, First Vice-Chief, Recording Secretary and Treasurer shall be elected by secret ballot, by a majority vote of all members present and voting at the Annual Menominee Indian Tribal Convention.

SECTION 3. *Tenure.* All officers elected under this Article shall serve in office for one year. Any vacancy occurring in these offices shall be filled by appointment by the Council of Chiefs until the next succeeding annual Menominee Indian Tribal Convention election.

## ARTICLE X

## MEMBERSHIPS

SECTION 1. Memberships shall consist of four categories:

a. *Menominee Indian Membership.* All Menominee Indians appearing on the final rolloff of the Menominee Indian Tribe which was approved by the Secretary of the Interior under date of November 26, 1957 shall be eligible for membership; provided, that no tribal member under 21 years of age shall vote in the organization. [Amended, see p. B17 below.]

b. *Associate membership of Menominee Descendants.* Any person or persons, descendants of en-

rolled Menominee Indians or persons recipients through inheritance of Menominee Enterprises, Inc., securities shall be eligible as associate members, with non-voting status.

c. *Associate membership of persons married to enrolled Menominees.* Any person married to an enrolled member of the Menominee Tribe shall be eligible as associate members with non-voting status.

d. *Associate membership of non-Indians.* Non-Indian applicants may be admitted to non-voting associate membership upon the consideration and recommendation of the Membership Committee with final approval by the majority vote of the membership assembled at the Annual Menominee Indian Tribal Convention.

e. *Membership prohibited.* No individual with known subversive activities or affiliation shall be admitted to membership.

SECTION 2. *Elective Membership.* All members of the Menominee Indian Tribe are eligible to join the organization of their own choice and voting membership and any other rules shall be prescribed in the By-laws.

SECTION 3. *Resignation.* A member may at any time file his or her resignation with the Recording Secretary, such must be in writing which shall become effective as of date filed.

SECTION 4. *Expulsion and Re-instatement of Members.* The Council of Chiefs may suspend or expel any member for cause, after an appropriate hearing before such body and in such manner as the Council of Chiefs shall direct. Any member so suspended or expelled may be re-instated in good standing by the affirmative vote of a majority of the members of the Council of Chiefs.

ARTICLE XI

AMENDMENT

These Articles may be amended by an affirmative vote of two-thirds of the registered members entitled to vote thereon at the regular meeting of the Annual Menominee Indian Tribal Convention, or special meeting of the members of the Corporation called for that purpose.

ARTICLE XII

NON-POLITIC

The Menominee Indian Tribe of Wisconsin, Inc., shall not engage in nor lend itself to partisan political activity.

ARTICLE XIII

INCORPORATORS

The Names and addresses of the Incorporators are:

NAME	ADDRESS
1. Atlee A. Dodge	Neopit, Wisconsin
2. Al Frechette	Neopit, Wisconsin
3. Gordon Dickie	Keshena, Wisconsin
4. Glenn Besaw	Neopit, Wisconsin

Executed in duplicate this 9th day of May, 1962.

/s/ Atlee A. Dodge  
/s/ Al Frechette  
/s/ Gordon Dickie  
/s/ Glenn Besaw

STATE OF            )  
                          )    SS  
County of            )

Personally came before me this 9th day of May A.D. 1962 the above named Atlee Dodge, Al Frechette, Gordon Dickie & Gleen Besaw to me known to be the persons who executed the foregoing instrument, and acknowledged the same.

(Notarial Seal)

/s/ Delores Ninham  
Notary Public  
Menominee County

My Commission expires 2/16/64

## ATTACHMENT B\*

## NOTICE

## MEMBERS OF MENOMINEE TRIBE

IN RESPONSE TO A PETITION CIRCULATED AMONGST MEMBERS OF THE MENOMINEE INDIAN TRIBE, WHICH HAS GENERATED INTENSE INTEREST, THERE IS HEREBY CALLED A SPECIAL MEETING OF TRIBAL MEMBERS TO RESOLVE IMPORTANT ISSUES CONFRONTING ITS MEMBERS, SUCH MEETING IS SCHEDULED FOR SATURDAY AT 1:30 P.M. AT ST. ANTHONY'S SCHOOL HALL AT NEOPIT WISCONSIN ON MARCH 17, 1962. EVERY MENOMINEE IS URGED TO ATTEND. THE FOLLOWING AGENDA IS THE ORDER OF BUSINESS:

1. Selection of Chairman and recording secretary.
2. Statement of purpose.
3. Creation of a non-profit corporation to re-establish the Menominee Indians and to preserve their customs, traditions, culture and for other purposes.
4. Selection of committee to draft corporation documents such as a charter and by-laws, etc.
5. Declare membership policy for the organization.
6. Any other business.

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\* Errors herein appear in the original typed minutes.



MINUTES  
OF ORGANIZATIONAL MEETING  
MENOMINEE NON-PROFIT,  
NON-STOCK CORPORATION

SPECIAL MEETING  
CONVENED AT NEOPIT, WIS.,  
MARCH 17, 1962,  
OF MENOMINEE TRIBAL MEMBERS

A meeting was held pursuant to a petition circulated among the Menominee people; and began at 1:30 p m on Saturday, March 17, 1962. Father Marcellus, pastor of St. Anthony's parish, opened the meeting with a prayer, after which Mr. Al Frechette read the petition and the order of business.

\* \* \*

Mr. Frechette \* \* \* He then read the statement of purpose, which follows: Fellow tribal members; We now have reached a serious impasse in the struggle for survival under the forceful termination of the Menominee Indians by the Congress of the United States. In only a few months under termination we deeply feel the hardships upon our families. Employment opportunities are non-existent and unemployment is widespread. The average family income is measurably low compared to the average of our neighbors in the surrounding communities. Inflated land prices for which Menominees are being assessed for land on which their homes are located are unreasonably high, and many Menominees have no means to acquire the land. These and many other problems, social and economic, prompts attention to cause a united front in seeking ways and means by tribal members for solutions of the new problems encountered in termination.

\* \* \*

Lawrence Richmond. There appears only one avenue available to the Menominee people under which it will be

possible for effectiveness, and to develop means to be heard and that is through the establishment of a legal organization permitted by law organizing the Menominee Indians to protect and promote their general welfare. The proposed plan for your consideration involves organizing a non-profit, non-stock corporation composed of tribal members, through a voluntary membership basis in the organization. Basically, the new organization is designed to provide for the re-establishment of the Menominee Indians of Wisconsin, to protect and preserve their identity, their cultures, customs, traditions, legends, language, crafts and to reserve such other inherent rights from former treaties with the United States and for other purposes.

It is imperative that we band together. Without a recognized organization, many of the rich heritages of the past will be lost. With the brave spirit of our forefathers and of our brave men and women that were in the services of their country in time of the Nations peril, we can again take our rightful place with honor among the many organizations of our country and pursue a noble cause in the interests of our own Menominee people. The Menominee Indians shall not perish.

\* \* \* \*

Mr. Al Dodge asked for the floor and emphatically supported Mr. Frechette's statement. He continued that at the present time we are under State authority, but our inherent rights from our ancestors and forefathers are in jeopardy, such as fishing and hunting, trapping; and that we inherited ownership of these rights which the State now is attempting to take away. Thus through this type of group organization we can be able to assert ourselves to interested parties and officials. For example, Mr. Dodge stated that in 1965 the State Legislature has the authority of a review corporation and stated that the

Cherokees have done so, and that they own and control the business on their reservation.

Mr Al Frechette submitted a resolution to the assembly as follows:

RESOLVED, that it is the sense of the Menominee Indian people assembled, this 17th day of March 1962 at Neopit, Wisconsin, that we hereby declare, and approve of the establishment of a non-profit, non-stock corporation to re-establish the Menominee Indians of Wisconsin, to preserve their identity, and to protect and preserve tribal customs, traditions, cultures, legends, language, crafts, and to reserve such other inherent rights from former treaties with the United States and for other purposes, and be it further,

RESOLVED, that the non-profit corporation shall be made available for membership to tribal members through a volunteer basis. Mr. Frechette moved for the adoption of the resolution, it was seconded by Mr. MacPherson.

Mr. Leon challenged the legality of voting on the resolution, that it was not legal to vote on the adoption since the assembly was not an organization. He further asked for a clarification of "non-profit", and since this is a lumber business, how could this new organization make a go of it?

The Chairman indicated that this new organization should not be confused with the Enterprise, that it was separate, and, this is a group of Menominees, for Menominees, where complaints could be registered legally. He then asked Mr. Al Dodge for a definition of non-profit. Mr. Dodge stated that it was just that, and according to Wisconsin statutes could be organized a group whose purpose is not that of making a profit, but non-profit. The Chairman continued that the resolution was the recognized legal technique for the beginning of a corpora-

tion, that a group of people want to form a corporation for non-profit.

Mrs. Deer, Mrs. Tucker, and Mrs. Boivin all expressed their concern over the fact that there was already an organization of Menominees whose purpose was very similar to that outlined in Mr. Frechettes Statement of Purpose, and they wondered just why it was necessary to have two organizations, and what the difference actually was.

The Chairman said that he didn't believe there should be a quarrel between the two organizations. He said this was a new organization which did not intend to usurp the activities of another group, and that there was no limit on the number of organizations in this county. He requested a peaceful assembly.

Mr. Dodge spoke and said that the main difference would be that the new organization would be a *legal* one.

Mr Gordon Dickie asked and was given the floor. He stated there seemed to be some confusion existing in the intent and purpose of the meeting. His understanding, he said, was that the purpose of a non-profit corporation to perpetuate the tribe with their inherent rights through law was indeed a good one. He suggested that there should be no mud-slinging, that individual problems as regarding personal crisis should be avoided because it would lose the respect and confidence of high officials whom we expect to deal with, and the general public. He further suggested that problems relating to labor is a separate and distinct item and should be treated as such.

\* \* \* \*

Mr. Al Dodge made a motion for an amendment to the main resolution on establishment of a non-profit, non-stock corporation which he read as follows: 1 . . . basis, and be it further

RESOLVED, that we hereby declare the membership policy in the proposed non-profit organization to be established, shall be first; all Menominee Indians appearing on the final roll of the Menominee Indian Tribe which was approved by the Secretary of the Interior under date of November 26th, 1957 shall be eligible, second; any other person or persons affiliated with the Menominee Indians through inheritance or marriage shall be declared associate members, provided further; that any other person or persons shall be eligible by vote of the members of the corporation established.

Mrs. Wilber suggested that membership be made according to the degree of Menominee blood. The Chairman said that it would be the next order of business, that is, the committee set up to establish charter, by-laws, etc., could handle any questions of this nature.

The Chairman then called for a vote on whether to adopt the amendment as read; the assembly registered a unanimous approval by a vote of 94 for, and none opposed, for the amendment. The Chairman then called for a vote on the main resolution. The main resolution was also adopted by a unanimous vote of 94 for and none opposed. The resolution and amendment were adopted. The Chairman stated the next order of business, selection of a committee to draft corporations documents, by-laws, charter, etc. He stated nominations were in order.

Mr. Bruce Wilber moved that a committee composed of seven members be chosen. The motion was seconded by Sparky Waukau.

Nominations from the floor followed, and those nominated for the Committee were; Mr. Hilary Waukau, Mr. Al Dodge, Mr. Gordon Dickie, Mr. Lawrence Richmond Jr. Mr. George Kenote, Mr. Manny Boyd, Mr. Atlee Dodge, Mr. James Frechette, Mr. Glen Besaw, Mr. Al Frechette, Mrs. Geraldine Boivin, Mr. Lawrence Richmond Sr.



Mr. James Frechette made a motion that all twelve of those nominated for the Committee be elected. The motion was seconded by Mr. Dodge. The Chairman called for a vote and the motion was carried by a vote of 97 for adoption, none opposed. All those nominated above composed the Committee whose duty it is to report the drafts of documents and together with recommendations to the next assembly scheduled for Saturday, April 14, 1962.

\* \* \* \*

Reverend Phillips presented what he observed to be the situation of the families whom he dealt with. He observed that lack of wood and lack of employment were more acute than ever before and that it seemed to him that there was very poor cooperation between mill management and labor. He stated that of 15 families 10 men were eligible for work, but that only 2 were employed; and none were eligible for drawing unemployment.

Several others gave examples of heads of families being out of work, among them; Mrs. Dick who stated she was supporting her son's family of three because he had no work; Mrs. MacPherson and their family of 12 with husband out of work; and finally Mrs. Deer who wondered what could be done to curb Mr. Bodine's authority or at least offer more employment for Menominees.

Mr. James Frechette and Mr. Waukau, both members of the Study Committee, advised the assembly that there were still funds available for such an examination, and that the Study Committee had always tried to act for the best interests of the tribe, both before and after termination became a fact.

Mr. Kenote, speaking for management, explained the many laws that management had to comply with and administer such as the federal wage and hour law, the Wisconsin tax load (94% of tax burden for the county) unemployment compensation insurance laws; he stated that wood was a money loser, that it had to be substituted for

chips, which could produce an income; and that where there once was 180 people employed, there was now 378 to 400.

Mr. Wilber asked several pertinent questions of Mr. Kenote, was it true that Jack Schumaker and Enterprise had committed themselves to the Conservation department to open up Bass Lake and the Mill pond to the public? Mr. Kenote answered no. Mr. Kenote was then asked why there had to be West Coast men here to fill jobs. He replied that people whom the Enterprise had contracts with felt more confident that the Enterprise could fulfill the contracts when such outsiders were here. Kenote continued that of 100 to 125 applications for employment by members of the tribe clearly showed a majority had no education beyond grade school, few beyond high school, and mostly lacking skilled experience.

\* \* \*

Mr. James Frechette pointed out that the Congress sometimes makes mistakes, and in terminating Indians they made a big one; proof of which is shown by the fact that no more Indians are being terminated. He further pointed out that from the historical viewpoint, Menominees have always provided excellent leadership and ability through trials and tribulations; and that through this legal organization the Menominees can again see themselves through this crisis. He urged a proper organization with the right type of leadership. He urged that all members actively participate towards bringing this new organization into an effective and strong group on a high plane reflecting the ingenuity and adaptability of the Menominee People

\* \* \*

Mr. Al Frechette announced that a mass meeting will be held at 7:00 p.m. Monday, March 19, 1962 at St. Anthony's hall.

GENERAL MINUTES OF MEETING OF MARCH 21, 1962, AND RECOMMENDATIONS OF THE COMMITTEE FOR THE ORGANIZATION OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN, INC., WHICH WAS ESTABLISHED AT A GENERAL ASSEMBLY OF MENOMINEE INDIANS ON SATURDAY, MARCH 17, 1962.

Mr. Al Frechette, by unanimous consent except for two members absent, was chosen chairman of the committee by the members present. The Chairman called roll as follows:

Mr. Hilary Waukau—present  
Mr. Al Dodge—present  
Mr. Gordon Dickie—present  
Mr. Lawrence Richmond Jr—present  
Mr. George Kehote—absent  
Mr. Manny Boyd—absent  
Mr. Atlee Dodge—present  
Mr. James Frechette—present  
Mr. Glen Besaw—present  
Mr. Al Frechette—present  
Mrs. Geraldine Boivin—present  
Mr. Lawrence Richmond Sr.—present

The Chairman stated that at the outset this meeting should be at the suggestion level, that we should make a note of some of the things to be incorporated into the documents for incorporation.

Mr. Waukau said he believe that many of the documents already in existence stated in broad terms many of the "inherent rights" and that this organization should look toward spelling out the specific rights, especially in the areas of hunting and fishing. He suggested that opinions (legal) regarding those rights were in printed form by the Wilkinson firm and by Lloyd Andrews and at least two others. He said he would like to see extended membership other than Menominees.

Mr. Al Dodge suggested membership be taken from the official rolls of the Menominee Tribe in 1957, and that "associate members" be specified further to include non-Menominees.

Mrs. Boivin wondered should there be any limitation as to payment of expenses in the non-profit organization?

Mr. Dodge stated that expenses were permitted according to Wisconsin Statutes, Chapter 181.

It was further suggested that in the preamble should be contained reference to all the Treaties, since there is where the source of the inherent rights, as hunting and fishing were specified.

The Chairman asked for suggestions as to the name to be used in connection with the Articles of Incorporation.

Mr. Waukau made a motion that the name Menominee Indian Tribe of Wisconsin, Incorporated, be reserved in the Secretary of State's office, and that the registration fee for same be forwarded as soon as possible by the secretary-treasurer of this committee. The motion was seconded by Mr. Dickie. The motion was adopted unanimously by the members present.

A voluntary contribution was asked for by the Chairman and those contributing equal amounts of \$1.00 were; Mr. Waukau, Mr. Dickie; Mr. James Frechette, Mr. L. Richmond Jr. and Mr. Glen Besaw.

#### Minutes of Meeting of Council of Chiefs

Call to order, June 6, 1962—Wednesday

Chairman called a quorum, 7 members present

Mr Dodge introduced a resolution requesting Bd of Directors intervene in Reynolds opinion on hunting and fishing. That copies made available and sent to Bodine, Wilkinson, and to each Bd member.

Supporting views included that should contest this opinion since it would ultimately lead to state ownership of waters which was granted irrevocably to the Menominee Indians by Treaty in their early history.

Mr Dodge moved for adoption of resolution

Second by L Richmond.

Minutes of Meeting of Council of Chiefs

[Date Unknown]

Roll taken, proxies noted :

Mr Al Dodge: States that he has found very little cooperation from Enterprise in connection with any action they have taken or are contemplating with respect to the issue of hunting and fishing. He believes that support should be obtained thru holding a mass meeting with the purpose of offering a direction to the Enterprise, and also gain membership for the Tribe, including pledges. Jr Richmond enters that he has heard of a contingency fund from which the Enterprise could draw for such a purpose.

Dodge continues that as yet he knows of no funds set aside for any court action, inspite of our repeated attempts to alert the Enterprise of the effect of adverse action on a determination of court cases now pending.

Mr. Dixon: Wonders what the story is because two members of this organization are also directors?

ch: States that there has been just discussion, no action.

Mr Al Dodge: Believes that what we need at this time is larger membership to give concrete evidence that Menominees are very concerned over the possible outcome of fishing hunting rights.



Mr. Waukau: Moves that a mass meeting be called for Friday night October 12, 1962 at 7:30 in Neopit Day School, emphasizing all sportsman and Menominees attend.

seconded by Jr Richmond.

motion carried

\* \* \* \*

PURSUANT TO PROPER NOTICE, A MASS MEETING WAS HELD IN NEOPIT DAY SCHOOL ON OCTOBER 12, 1962 BY CALL OF THE COUNCIL OF CHIEFS, MENOMINEE INDIAN TRIBE OF WISCONSIN, INC.

Call to order by Mr. Frechette.

Mr Dodge: provided a background on the events leading and centering around Reynolds' opinion on hunting and fishing; briefly states what action the Tribe has done to achieve aid in defense of the case now pending in Court in Shawano. He further question whether there has been proper time to pursue damages, since have been out from under government such a short time. He further invites more discussion.

\* \* \* \*

Mr. Kenote: He insists that hold off any action until legislature meets, then thru it solve the problem, he further insists that we have many friends in the Conservation department, on the Commission, in the legislature, who have made enforcement officers not strictly enforce all the game laws, thus he believed that we should not go off half cocked and rile up our good friends and break their good faith.

Mr Rieder: Asks of Kenote, Can hunt and fish?

Mr Kenote: Yes and no. Frankly states that any hunting or game law that is being violated will be prosecuted, i.e. contrary to any game law in the nation. He further stated that taking your own chance if insist on hunting fishing in the same manner as accustomed to as Indians.

Mr Al Frechette: Stated that attended Basina's hearing and stated that Traeger needs much help in the case,

since he is defending on a point of law, now on the violations themselves.

Comments from the floor insisted that we cannot wait any longer, that we had in fact much to lose if we did not act as soon as possible, and that the Conservation department was acting very fast in trying to take control of the fish and game.

Mr Peterson: Ask of the assembly whether the justice of peace can handle game law violations of outsiders?

Mr Fossum: States that the county board has not set up the justice court as yet, and don't know whether the board can.

Mr Peterson: Insists that even tho we are many, does not truly represent all the Menominees here tonight, therefore moves to amend the resolution as follows:

I move to amend the resolution to provide t at a referendum on the subject be submitted to eligible voters on the Menominee Final Roll, such to be made within the next ten days and provided further that Mr Lloyd Andrews be engaged as attorney of record to represent the Menominee Indian Tribe".

The vote on the referendum is as follows:

For	Against
63	0

amendment unanimously adopted

Mr Kenote: Cautions the assembly not to attempt to retain attorney Andrews against his best advice, "don't try to lock his hands".

Vote on the main resolution:

For	Against
62	0

Al Dodge moved for adjournment, 2nd by Fossum

## NOTICE

Pursuant to instructions advanced by interested Menominee Indians and the Menominee Indian Tribe of Wisconsin, Inc., which met at the Neopit Day School at Neopit, Menominee County, Wisconsin on October 12, last, it was agreed that a referendum vote be submitted to Tribal members on the Final Roll to determine and give direction as to specific action that may be instituted to protect and preserve inherent Menominee Tribal property rights as such relates to hunting, fishing and trapping. Accordingly, the referendum was conducted in Menominee County and polling places were at Zoar, Neopit, South Branch and Neopit. The result of the vote reflects an overwhelming sentiment to bring an action against the Wisconsin Conservation Commission, such to be instituted by the Menominee Indian Tribe of Wisconsin, Inc., in behalf the Menominee Indians on the subject and the vote is as follows:

PLACE	IN FAVOR	OPPOSED
Keshena	25	None
South Branch	49	None
Neopit	116	1
Zoar	18	None
Total:	208	1

Upon the basis of such results the Menominee Indian Tribe of Wisconsin, Inc., will be guided and pursue such course of action.

AL FRECHETTE  
Principal Chief  
Menominee Indian Tribe of  
Wisconsin, Inc.

Secretary  
ATLEE A DODGE

## RESOLUTION

WHEREAS, on May 21st 1962, the Attorney General of the State of Wisconsin, John W Reynolds, rendered a legal opinion which prescribed that the Wisconsin Laws and rules with respect to hunting and fishing apply to the lands of Menominee County and to those citizens of Wisconsin that trace their ancestry to the Menominee Indian Tribe, and

WHEREAS, the Director of the Wisconsin State Conservation Commission on July 10, 1962 directed a letter to the Chairman of the Menominee County Board informing him that Menominee County would be treated the same as all other counties in the state with reference to all matters including hunting, fishing, trapping and that the Department was responsible for establishing rules and regulations and enforcing the law, and

WHEREAS, due to the action of the Attorney General of Wisconsin and the Conservation Commission, members of the Menominee Indian Tribe whose names appear on the final roll approved by the Secretary of the Interior on November 26th, 1957, have been denied certain inherent tribal property rights herein defined as hunting, fishing and trapping in Menominee County, and

WHEREAS, the Menominee Indian Tribe of Wisconsin, Inc., felt deep concern over the unwanton infringement on tribal rights and caused to call a general meeting of members of the Menominee Indian Tribe on October 12, 1962 to develop ways and means and give direction as to the proper course to pursue to protect and preserve tribal hunting, fishing and trapping rights, now therefore

BE IT HEREBY RESOLVED, that it is the sense of the general meeting of the Menominee Indians, duly convened at Neopit, Menominee County, Wisconsin, this 12th day of October, 1962 that we hereby authorize and support the Menominee Indian Tribe of Wisconsin, Inc. to com-

mence such legal action necessary or otherwise, in the Federal Courts of the United States, seeking a remedy from the adverse opinion rendered by the Attorney General of Wisconsin relating to hunting, fishing and trapping rights the Menominees declare as inherent property rights, which opinion denies these rights,

AND BE IT FURTHER RESOLVED, that it is recommended that an immediate action be instituted in the Federal Court of the Eastern District of Wisconsin, seeking an injunction against the Wisconsin Conservation Commission restraining such Commission from enforcing the opinion of the Attorney General of Wisconsin affecting members of the Menominee Indian Tribe, until the issue can be resolved by a court of competent jurisdiction,

AND BE IT RESOLVED FURTHER, that it is understood that the authorization and direction herein made shall be in behalf the members of the Menominee Indian Tribe whose names appear on the Final Roll.

\* \* \* \*

### A RESOLUTION

RESOLVED, that it is the sense of the Council of Chiefs of the Menominee Indian Tribe of Wisconsin, Inc., in a special convened meeting at Neopit, Menominee County, Wisconsin, this 24th day of January 1963, that we hereby emphatically oppose the proposed dam on the Wolf River at Pearson in Langlade County, as such dam would seriously affect and jeopardize the waters, fish, wildlife, forests and recreational resources of the Menominee Indians in Menominee County . . . .

\* \* \* \*

Mr. Dickie: I move for the adoption of the resolution.

Mr. Richmorf: I second the motion.

Result: Unanimously adopted.

ATLEE A DODGE  
Secretary

AL FRECHETTE  
Principal Chief

\* \* \* \*



## MENOMINEE INDIAN TRIBE OF WISCONSIN, INC.

## RESOLUTION "A"

RESOLVED, that it is the sense of the Menominee Indian Tribe of Wisconsin, Inc., assembled in special meeting of the General Council this 16th day of March, 1968, by affirmative vote of two-thirds of the registered members entitled to vote, that the Articles of Incorporation of the Menominee Tribe of Wisconsin, Inc., dated May 9, 1962, are hereby amended to read as follows:

*Article X, Section 1 (a)*, is amended to read as follows:

"a. *Menominee Indian Membership.* All Menominee Indians appearing on the final roll of the Menominee Indian Tribe which was approved by the Secretary of the Interior under date of November 26, 1957, and all descendants who meet the criteria of the Enrollment Act of 1934, as amended, shall be tribal members; provided, that no tribal member under 21 years of age shall vote in the organization."

*Article XI* is amended to read as follows:

"These Articles may be amended by an affirmative vote of two-thirds of the registered members present and entitled to vote thereon at the regular meeting of the Annual Menominee Indian Tribal Convention, or special meeting of the members of the Tribe called for that purpose."

\* \* \* \*

The undersigned duly qualified and acting secretary of the General Council meeting of the Menominee Indian Tribe of Wisconsin, Inc., does hereby certify that this Resolution was regularly adopted by a vote of 100 to 4, at a legally convened meeting of such General Council held at Neopit, Wisconsin, on the 16th day of March, 1968, and further that such Resolution has been fully

recorded in the Minutes of the proceedings of such General Council meeting. In witness whereof I have hereunto set my hand and seal this 16th day of March, 1968.

/s/ Letitia B. Caldwell [SEAL]  
LETITIA B. CALDWELL  
Secretary of the Meeting

\* \* \*

The following resolutions were adopted March 16, 1968, by the General Council:

#### RESOLUTION NO. 1

[Adopted 96 to 0]

The Council of Chiefs is instructed to draw up a roll of tribal members as of December 31, 1967. The said roll shall be updated annually.

\* \* \*

#### RESOLUTION NO. 2

[Adopted 107 to 0]

All tribal members, as defined in Article X of the Articles of Incorporation, Section 1 (a), and only such members, shall have the right to exercise tribal hunting and fishing rights, subject to tribal regulations;

PROVIDED, HOWEVER, that any member who violates any tribal hunting or fishing regulation may upon finding of the Council of Chiefs be declared ineligible to exercise such rights, for such period of time as the Council of Chiefs may specify.

\* \* \*

RESOLUTION NO. 3

[Adopted 112 to 1]

It is hereby declared to be the continuing policy of the Menominee Tribe that sound tribal conservation practices shall be adhered to at all times to ensure the continued presence of ample game and fish on the Menominee Indian Reservation.

\* \* \*

RESOLUTION NO. 4

[Adopted 103 to 0]

The Menominee Tribe hereby reaffirms and continues its tribal custom and regulation that no Tribal member having caught any fish or game in the exercise of tribal hunting or fishing rights shall sell such game or fish or otherwise engage in any commercial transactions as to such game and fish.

\* \* \*



## ATTACHMENT C

EXCERPT FROM JOINT HEARINGS ON TERMINATION OF FEDERAL SUPERVISION OVER CERTAIN TRIBES OF INDIANS, BEFORE SUBCOMMITTEES OF THE SENATE AND HOUSE COMMITTEES ON INTERIOR AND INSULAR AFFAIRS, 83D CONG. 2D SESS (1954), PP. 254 AND 255.

*[The speaker are discussing the Klamath Termination bill]*

[Associate Commissioner of Indian Affairs H. Rex Lee] Now, in terms of the fishing and hunting rights, I think that is a little different. I can anticipate a little difficulty on the part of the local officials out there maybe 25 or 50 or 75 years from now, trying to determine who has hunting and fishing rights.

Representative D'EWART. Not only that, but who has the tribal rights? That is the point I am trying to get at.

Senator WATKINS. You may have a hundred thousand Indians then that would claim the hunting and fishing rights.

Mr. LEE. That is right. And I anticipate that they would have a little bit of difficulty proving to the courts what their rights were. That would be a matter between the courts and the individuals affected.

Senator WATKINS. I would suggest that possibly it might be a good idea for the United States to buy out that so-called right to pay them off, because then you would not have difficulty with the white people in those areas. If we go on 25 or 50 years from now and we have a large increase in Indians, and they have just a trace of Indian blood, and claim that "as a descendant of so-and-so, I claim the right to fish and hunt"—there would be the question of who did have the right to fish and hunt. Under those circumstances, it might pay to negotiate it with them to buy it out, pay them off completely, and put them all on the same basis.

Mr. LEE. I agree that there could be a number of lawsuits on this. I can anticipate that 25 or 50 years



from now there could be a lot of questions as to whether this individual or that individual has fishing rights. It seems to me at that stage of the game the Federal Government is still out of the question.

Senator WATKINS. I know we passed on some headaches to the State, and I notice in one of the statements here from the Chamber of Commere [sic] of Klamath itself, it says:

Section 14 (b) of the bill is a clear example of the sort of thing to which the chamber is opposed. This subsection provides:

"Nothing in this act shall abrogate any fishing rights, or privileges of the tribe or the members thereof enjoyed under Federal treaty."

Article 1 of the treaty of 1864 provides: " \* \* \* the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid \* \* \*."

I do not know how much that would be worth, but at least it is worth talking about to see if we can not by mutual agreement eliminate the controversy for the future.

Mr. LEE. I would certainly agree with you that it is worth exploring, that is, the possibility of buying out those rights. I think that is something that you people have to consider and decide on.

We have this proviso in here simply because we do have a treaty obligation, and we have no authority at the present time to work out from under that. Neither do we want to be in a position of recommending that a treaty right be violated. But if the Congress decides that they would like to try and commute this treaty right and make a lump-sum payment for it, then we would have to go back and negotiate with the Indians to see whether or not such a settlement were possible or satisfactory.

Senator WATKINS. And, of course, they are always open to this possibility: The court might say they are entitled to a fishing and hunting right, but they would have to take it under regulation. Just like I am entitled to a hunting and fishing right in my State, but it is subject to the rights of the rest of the people and would be under some regulation. So, in the end, it might be desirable for the Indians themselves to take reasonable compensation for it and get out from under and go along with the rest of the people and fish and hunt when they do.

Mr. LEE. It is entirely possible that it would be to their advantage.

APR 19 1968

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

On Writ of Certiorari to  
the United States Court of Claims

**SUPPLEMENTAL REPLY BRIEF  
OF THE MENOMINEE TRIBE**

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JAMES R. MODRALL, III  
*Of Counsel*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967.

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No. 187

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MENOMINEE TRIBE OF INDIANS,  
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**SUPPLEMENTAL REPLY BRIEF  
OF THE MENOMINEE TRIBE**

---

The opinion of the Court of Claims below is now reported at 388 F.2d 998.

In its brief filed April 5, 1968, the State of Wisconsin made several points which warrant reply. At p. 4, Wisconsin says that the Menominee Termination Act contains no reservation of hunting and fishing rights or privileges in favor of the Indians, and that the stated purpose of the Act was to subject the Menominees to the same laws, privileges and responsibilities as are applicable to all oth-

er citizens. This is true, of course. But there was no affirmative conveyance of non-trust property, either; and beyond that, Congress was authoritatively told—by the drafters of the bill—that the bill would not impair Menominee treaty rights,<sup>1</sup> and indeed, Senator Watkins, the father of the bill, said upon the occasion of the signing of the bill, that<sup>2</sup>

“The bill in no way violates any treaty obligation with this tribe.”

The Klamath Termination Act has been held by both state and federal courts not to have cut off the Klamath treaty hunting rights.<sup>3</sup> The same exception was intended in the Menominee Act.

Wisconsin relies (pp. 19-20) on the declaration of the Tribe's attorney, Mr. Wilkinson, to the joint committee, that the bill would abrogate the hunting and fishing rights. This declaration was indeed made,<sup>4</sup> but its purpose was to urge Congress to expressly save the rights, in order to avoid the uncertainty which could (and did) lead to extensive litigation. Furthermore, it was authoritatively superseded by the drafters of the bill, the officials of the Interior Department, who said that the bill would *not* abrogate any treaty rights.<sup>5</sup> That the committee accepted the Interior Department's view is shown by Sena-

<sup>1</sup> See our main brief of November 24, 1967 (Pet. Main Br.) at pp. 22-23.

<sup>2</sup> 100 Cong. Rec. 8538 (1954).

<sup>3</sup> *Klamath & Modoc Tribes v. Maison* (D.Ore. 1963) (unpublished; reprinted in the appendix to the petition for certiorari, p. 74; *aff'd on other grounds*, 338 F.2d 620 (9th Cir. 1964)), and *State v. Pearson* (Klamath County District Court, 1961) (unpublished; reprinted in the appendix to the petition for certiorari, p. 70).

<sup>4</sup> As we noted, Pet. Main Br. 23.

<sup>5</sup> *Id.* at 22-23, and see our supplemental brief of April 9, 1968 (Pet. Supp. Br.) at p. 21-22.



tor Watkins' declaration, quoted above at note 2, that the bill in no way violated any treaty rights.

At pp. 7-9, Wisconsin asserts that Congress has the power to abrogate Indian treaty rights. We concede this, but we say that Congress had no intention in this case of abrogating any treaty rights. Even if its intent were unclear, the rule of statutory construction with respect to Indians is that a treaty right will not be presumed to be abrogated *sub silentio*.<sup>6</sup>

At pp. 35-40, Wisconsin discusses the Klamath Termination Act and the cases decided thereunder. Wisconsin states (p. 35) that the 1956 Klamath case in the U.S. District Court<sup>7</sup> did not mention the Klamath Termination Act. This is true; we cited that particular case in our main brief only for the proposition that the Klamaths had a treaty right to hunt, even though the Klamath treaty did not expressly mention hunting. It was not until the *second* phase of that case in 1963 that the court held that that treaty hunting right survived the Termination Act.<sup>8</sup>

The Klamath Termination Act gave the tribal members an option to withdraw from the tribe and be paid the value of their pro rata share of the tribal estate.<sup>9</sup> Pursuant to this option, almost 80% of the tribe's members withdrew, and received over \$40,000 each. The payoff funds were made available by the United States purchasing from the tribe so much of the reservation (which was valuable forest land) as was necessary to pay off all of the withdrawing members. The land so purchased by the United States was placed into the Winema National Forest, leaving only a part of the former reservation still

<sup>6</sup> See *Squire v. Capoeman*, 351 U.S. 1 (1956), and other cases cited Pet. Main Br. 21.

<sup>7</sup> *Klamath & Modoc Tribes v. Madison*, 139 F.Supp. 643 (D.Ore. 1956).

<sup>8</sup> Unpublished, see citation at note 3 above.

<sup>9</sup> 25 U.S.C. § 564d(a)(2).

in tribal ownership. In 1961 these remaining tribal lands were transferred from the United States as trustee for the tribe, to the United States National Bank of Portland, as trustee for the tribe.

In the 1963 phase of the Klamath case, the U.S. District Court held that notwithstanding the Klamath Termination Act, the remaining members had a right to hunt on the lands which still remained in tribal ownership.<sup>10</sup> The court also held that the tribe's hunting rights had been cut off as to the tribal lands purchased by the United States.

The latter point—that the hunting rights had been cut off as to lands purchased by the United States—was appealed to the Ninth Circuit by the tribe.<sup>11</sup> The Ninth Circuit affirmed, agreeing with the District Court that the hunting rights had been cut off as to the lands no longer owned by the tribe. It was in this context that the court made the statements quoted at length by Wisconsin at pp. 37-39.

We note that the Ninth Circuit had before it the views of the United States, appearing as *amicus curiae*<sup>12</sup> (which views the United States no longer subscribes to). The United States expressly referred to the memorandum which it filed in this Court<sup>13</sup> upon the occasion of our petition for certiorari from the Wisconsin Supreme Court's decision in the initial phase of the instant case. The tone of the Government's memorandum in *Klamath*, as in *Sanapaw*, was distinctly hostile to any claims by the

<sup>10</sup> Or more accurately, the land which the tribe still owned beneficially, though the trustee had changed from the United States to the United States National Bank of Portland.

<sup>11</sup> 338 F.2d 620 (1964).

<sup>12</sup> Memorandum for the United States as *Amicus Curiae*, 9th Cir. No. 19231 (July, 1964).

<sup>13</sup> Memorandum for the United States, *Sanapaw v. Wisconsin*, No. 930, O.T. 1963 (June, 1964).

Indians of surviving hunting and fishing rights. It presented in *Klamath*, as in *Sanapaw* the totally erroneous theory that the basis for the Klamath hunting rights was the simple immunity of the Klamath Tribe to state laws on the reservation prior to termination. Therefore, its theory went, since the Termination Act extended state laws into the reservation, there was no longer a basis for the immunity for the hunting activities. This theory, patently little thought-through and erroneous, has been rejected expressly or by implication by the three Klamath decisions<sup>14</sup> and the three Menominee decisions.<sup>15</sup> The Government has now quite properly withdrawn its adherence to such a theory.

It is impossible to say to what extent this amicus brief by the United States was influential in the decision reached by the Ninth Circuit. The Ninth Circuit quoted the amicus brief, and stated that it was in agreement with the position expressed in that brief (i.e., that the Klamaths should no longer be "specially treated"). See Wisconsin's brief p. 38.

We do not want to leave the discussion of the Ninth Circuit decision in the Klamath case without expressing our strong disagreement with the conclusion reached by that court. In our opinion, the United States could not abolish the Klamath hunting and fishing rights simply by acquiring the tribal lands and putting them into a National forest. We think the *Winans* and *Seufert* cases apply here, to the effect that the hunting and fishing rights survived the transfer of the land from the tribe to the United States.<sup>16</sup>

<sup>14</sup> Notes 3 and 7 above.

<sup>15</sup> Trial court's decision in the *Sanapaw* case, App. 36; Wisconsin Supreme Court's decision in the same case, App. 51; and the decision of the Court of Claims below, App. 5.

<sup>16</sup> *United States v. Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919). These cases held that the Indians' fishing rights on certain land outside the reservation con-

At pp. 42-43, Wisconsin says it cannot seriously be claimed that the hunting and fishing rights will attach to all lands and waters within the former reservation. But we claim exactly that. Neither this treaty, nor any other to our knowledge, provided for termination of the rights whenever the land left tribal or federal ownership. The *Winans* and *Seufert* cases (note 16 above) recognized that the rights continued in the original geographic situs even as to lands patented to white landowners with no express reservation of the rights.

At pp. 40-41, Wisconsin states that after it became a State in 1846, the Menominees ceded all their interest in Wisconsin in 1848, and therefore, the jurisdiction and sovereignty of Wisconsin attached to the lands involved herein. We are not certain what Wisconsin's point is. If it is suggesting that the later setting aside of the Menominee Reservation in 1854 did not oust the state's jurisdiction, or that somehow tribal-federal jurisdiction was less complete than on ordinary reservations, we would disagree: (1) The treaty was, under the Constitution, the "supreme law of the land," and rights protected under it would not be lost due to the possible hiatus in the Tribe's title to its land; (2) The Menomines only conditionally ceded their Wisconsin lands and agreed to move out, and when the condition (i.e. adequate hunting and fishing resources on the new lands) was not satisfied, the cession was rescinded, and their acquisition of the Wolf River Reservation related back to 1848, so that they never lost title; and (3) in 1853 the Wisconsin legislature *consented* to the setting aside of the 1854 reservation,<sup>17</sup> which constituted a retrocession of jurisdiction to the federal government and the tribe, just as it existed prior to statehood.

tinued even after that land had been patented by the United States to white landowners, without any reservation of the rights. In *Winans* the situs was within the tribe's aboriginal territory, which it had ceded to the United States, but in *Seufert* the situs was outside the tribe's aboriginal boundaries.

<sup>17</sup> The resolution is quoted at Pet. Main Br. 6, n. 6.

At p. 42 Wisconsin says the problem of identification of those entitled to exercise of rights would be "nearly insurmountable." We do not see any problem at all. The Tribe has provided for an annual updating of its membership roll.<sup>18</sup> and this roll would be the basis for personal membership cards to be issued by the Tribe, which could be displayed to the game warden upon challenge.

In its memorandum to this Court dated January 19, 1968, Wisconsin relied on and quoted from *Ward v. Race Horse*.<sup>19</sup> It does not repeat its reliance in its brief of April 5, but in case any question remains, it may be noted that this case, the first one decided by this Court on Indian hunting and fishing rights, is of little value here for two reasons—first, it dealt with off-reservation hunting and fishing rights, i.e., rights on lands owned by non-Indians outside the reservation, whereas the instant case involves rights on lands within the former reservation and still Indian-owned for all practical purposes. Secondly, *Ward v. Race Horse* has been modified by this Court; whereas the *Race Horse* opinion held that the mere admission of the State into the Union abrogated off-reservation treaty hunting rights, this Court has since held that

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<sup>18</sup> Resolution No. 1, Pet. Supp. Br. B18.

<sup>19</sup> 163 U.S. 504 (1896).



this is not so, both as to private interference,<sup>20</sup> and at least to some extent as to state interference.<sup>21</sup>

Respectfully submitted,

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April 19, 1968

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<sup>20</sup> See the *Winans* and *Seufert* cases, note 16 above.

<sup>21</sup> *Tulee v. Washington*, 315 U.S. 618 (1942), and see interpretations of *Tulee* by the Ninth Circuit, *Holcomb v. Confederated Tribes*, 382 F.2d 1013 (9th Cir. 1967), and related cases cited and discussed in our reply brief filed January 15, 1968, at p. 2. See the analysis of *Race Horse in State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert. den., 347 U.S. 397.

APR 26 1968

JOHN F. DAVIS, CLERK

In the  
**SUPREME COURT of the UNITED STATES**

October Term, 1967

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**No. 187**

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THE MENOMINEE TRIBE OF  
INDIANS, et al.

v.

THE UNITED STATES

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**REPLY BRIEF AND APPENDIX OF THE STATE  
OF WISCONSIN, AMICUS CURIAE  
ON RE-ARGUMENT**

---

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In the  
**SUPREME COURT of the UNITED STATES**

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**No. 187**

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**THE MENOMINEE TRIBE OF  
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**v.**

**THE UNITED STATES**

---

**REPLY BRIEF OF THE STATE  
OF WISCONSIN, AMICUS CURIAE  
ON RE-ARGUMENT**

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In the briefs filed to date, both the petitioner and the United States have based their arguments on what we regard to be an inappropriate premise. Both parties have addressed themselves to the question of where the treaty hunting and fishing rights now reside. The real import of the controversy, as we view it, is whether Congress can, by implication, deny to the State of Wisconsin a portion of its sovereignty, conferring it instead on a private corporation. This, we submit, is the end result of the positions advanced by the parties herein.

The brief of the petitioner on reargument raises no new questions regarding the legislative history of the Termination Act. It does, however, bring into the picture a

✓

second corporate entity, "The Menominee Indian Tribe of Wisconsin, Inc.," which was established under Wisconsin's general nonprofit corporation law in 1962 by certain enrolled Menominees.<sup>1</sup> This corporation, the petitioner contends, is the true successor entity to the former Menominee Tribe and has assumed "ownership" of the special treaty hunting and fishing rights (Petitioner's Supplemental Brief, pp. 13-15). These rights, according to the petitioner, may be exercised within the boundaries of the 1854 reservation (Pet. Supp. Brief, p. 16).

The United States contends that the present enrolled members continue to share these rights among themselves, exercisable only on "communally" held lands (United States Supplemental Brief, p. 10).

## I. REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF.

### A. Formation of a new private corporation by certain Menominees cannot re-instate a tribal entity which Congress previously had extinguished.

Menominee Indian Tribe of Wisconsin, Inc. (hereafter referred to as the "tribal corporation") was incorporated under chapter 181, Wisconsin Statutes, in May, 1962, for the stated purpose, among others, of "re-establish (ing) the Menominee Indian Tribe of Wisconsin."<sup>2</sup> This purpose is also evident in the minutes of the organizational and other

<sup>1</sup>The Articles of Incorporation reprinted in the appendix to Petitioner's Supplemental Brief, while containing the essential elements of the true articles, differ from those on file in the office of the Secretary of State of Wisconsin. Reference to the articles in this brief will be to the articles as filed, and as reproduced in Appendix A to this brief.

<sup>2</sup>Articles of Incorporation, Art. 3. See appendix, p. 1a.

meetings discussed by the petitioner.<sup>3</sup> This corporation is not, as petitioner would have it, the "successor" to the former Menominee Tribe. It is a private corporation organized under Wisconsin law by private citizens of the state.

In Wisconsin, as elsewhere, corporations are creatures of the state and possess only such powers as are authorized by law. *Fleischer v. Pelton Steel Co.* (1924), 183 Wis. 451, 455, 198 N. W. 441; *Brown Deer v. Milwaukee* (1962), 16 Wis. (2d) 206, 213, 114 N. W. (2d) 493, cert. den. 371 U. S. 902. A corporation cannot clothe itself with a power merely by naming it in its articles of incorporation. A corporation may do no act except in subordination to the laws of the state, for the exercise of corporate powers is subject to the general statutes of the state in which it is organized. See 19 Am. Jur. (2d), Corporations, pp. 434, 436, §§ 955, 957.

We have been unable to find any statutory authorization for the corporate exercise of powers such as those contemplated by the articles and bylaws of the tribal corporation<sup>4</sup>—which are, in essence, powers to hold and regulate special hunting and fishing rights. If, as petitioner argues, the treaty hunting and fishing rights survive in this corporation, the corporation then has the power to recognize or withhold them at will. In other words, the corporation would be able to confer upon virtually any-

<sup>3</sup>Pet. Supp. Brief, pp. 9 et seq., Pet. Supp. App., pp. 112-134

<sup>4</sup>Sec. 181.04, Wis. Stats., sets out the powers of nonstock Wisconsin corporations

one<sup>5</sup> the right to hunt and fish free from state regulation within one of Wisconsin's 72 counties. As petitioner indicates at p. 13 of its Supplemental Brief, these rights are exercisable by "members"—and membership is not limited to Indians, much less to enrolled Menominees. In addition, the corporation may revoke such rights with regard to certain individuals, who would then "be fully subject to State hunting and fishing regulations" for "such period of time" as the corporation might specify.

Even petitioner concedes that the treaty rights cannot be conferred on a non-Indian,<sup>6</sup> yet non-Indian membership is precisely what is contemplated by the Articles of Incorporation of the same corporation which petitioner earlier contends is the successor entity to the tribe, insofar as possession of these rights is concerned.<sup>7</sup>

It is the position of the State of Wisconsin that the Termination Act unequivocally cut off these rights. The subsequent action of all 3270 enrolled Menominees could not alter this fact—nor can the action of, less than 100<sup>8</sup> Menominees in forming a corporation change the effect of this Congressional action.

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<sup>5</sup>The Articles of Incorporation permit any person—whether Indian or non-Indian—to become a member. See Article 10, Appendix, pp. 2a-3a.

<sup>6</sup>Pet. Supp. Brief, p. 16

<sup>7</sup>*Ibid.*, p. 13

<sup>8</sup>*Ibid.*, p. B 6 (Appendix)



**B. The effect of the Termination Act was to abolish the Menominee Tribe as a recognizable entity and to destroy the reservation status of the lands.**

We have set forth our position in this regard in the opening brief. However, because of the discussion on pp. 16-19 of the petitioner's brief, the following statement is offered.

We agree that the Termination Act does not expressly state that "the Menominee Tribe is hereby abolished for any and all purposes." The effect of the act, however, is obvious. All vestiges of tribal existence as a political entity have been dissolved, and what was formerly the reservation is now a duly organized Wisconsin County. The lands have been conveyed to a private corporation, Menominee Enterprises, Inc. These and the other matters discussed in our opening brief indicate the *de facto* abolition of the Indian status of the Menominees and their lands.

Petitioner argues that if Congress had intended to terminate tribal existence it could have said so, as it did in the Choctaw Termination Act (Pet. Supp. Brief, p. 19). The simple fact is that, when brought to finality in 1961, the Act did terminate tribal existence. We might also suggest that if Congress had intended to "preserve" certain rights in the Menominee Act, it could have so stated—as it did in the Klamath, Ute, Paiute, Wyandotte and Ottawa Termination Acts.<sup>9</sup>

We submit that the discussion of the Klamath and Flathead Acts on pp. 18-19 and 21-23 of the Petitioner's Supplemental Brief is wholly irrelevant to the questions now before this court.

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<sup>9</sup>25 U. S. C. §§ 564, 677r, 757, 806 and 851.

**C. The rights granted to the Menominees in the 1854 treaty are in the nature of land-use privileges and cannot survive a conveyance in fee of the tribal lands to a private corporation.**

The United States conveyed title to all reservation land—forest and otherwise—to Menominee Enterprises, Inc., a private stock corporation. Menominee Enterprises, as a corporation, is an entity separate and distinct from its shareholders. *Jonas v. State* (1963), 19 Wis. (2d) 638, 644, 121 N. W. (2d) 235; *North Gate Corp. v. National Food Stores* (1966), 30 Wis. (2d) 317, 324, 140 N. W. (2d) 744. In legal form, Menominee Enterprises, Inc., is no different from any other Wisconsin corporation. As a result, the effect of the conveyance of reservation lands is similar to the issuance of a patent to a non-Indian. Any rights to hunt and fish such lands would be analogous to the "off-reservation hunting rights" which were held subject to state regulation in *Ward v. Race Horse* (1896), 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244, and succeeding cases. See Hobbs, "Indian Hunting and Fishing Rights," 32 Geo. Wash. L. Rev. 504 (1964). See also *State v. Johnson* discussed at pp. 42-43 of the State of Wisconsin's opening brief on re-argument.

The treaty from which the Menominee rights were derived states (10 Stat. 1064):

"\* \* \* The United States \* \* \* do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country \* \* \*"

The United States, through the Wolf River Treaty, did not give the Menominees any rights other than those relating to the use or "holding" of certain lands. What was given

was land, together with a privilege of unrestricted use of the land for hunting and fishing. This was the way Indian lands were "held" in 1854, and the language of the treaty reserved to the Menominees the right to so "hold" the reservation lands. Petitioner's argument would have these privileges not only survive the patent of reservation lands to a private corporation (and to certain individuals)—but would extend them to anyone who might hereafter be admitted to membership in the 1962 "tribal" corporation. The lands are no longer "held as Indian lands are held." They are in private ownership, are on the tax rolls and comprise a duly organized Wisconsin county.

Petitioner greatly expands the language of the treaty by asserting that the rights conferred thereby are not dependent upon the land (which, after all, was the sole subject of the treaty), but rather are based upon the Menominees' status as Indians (Pet. Supp. Brief, p. 15). It is precisely this status, and the concomitant trust relationship, that Congress was attempting to terminate in the 1954 Act—even if that act is construed in the most restrictive and narrow manner imaginable.<sup>10</sup>

If, as petitioner contends,<sup>11</sup> the surviving treaty rights would not outlast "termination of the tribe as an entity," the State of Wisconsin is still in an impossible position.

<sup>10</sup>See, for example, 25 U. S. C. § 899, and the April 29, 1961, proclamation of the Secretary of the Interior, both of which provide that, after termination:

"... individual members of the Menominee Tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians; all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Menominee Tribe; and the laws of the several States shall apply to the Menominee Tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." (Emphasis added)

<sup>11</sup>Pet. Supp. Brief, p. 15.

Petitioner argues in another portion of its brief that the "tribal entity" survives in a new tribal corporation—a corporation whose membership (and presumably eligibility to exercise the treaty rights) is dependent only upon the whim of those participating in its affairs. What affairs these might be, and who is presently a "member," is unknown. In addition, the participants can "revoke" individual treaty privileges for an indeterminate period of time.

The "tribal corporation" which is now claimed to have succeeded to ownership of the treaty hunting and fishing rights was not even in existence for more than a year after final termination. It was in no way contemplated by either the terms of the act or the approved plan. Under its statutory powers, the corporation is free to sell, pledge, or otherwise dispose of its assets—which presumably include the hunting and fishing rights. See sec. 181.04 (5), Wis. Stats.

The idea of preserving treaty rights in a corporation organized by a few Menominees as an afterthought to termination is repugnant not only to the fact of termination, but also to the terms of the treaty itself.

## II. REPLY TO SUPPLEMENTAL BRIEF OF THE UNITED STATES.

The first portion of the government's brief, particularly pp. 6-7, appears to assert that the State of Wisconsin has, as a result of the Termination Act, assumed the "trustee" role previously played by the United States, and may regulate to the same extent as the federal government prior to termination. Whether the federal government ever had such authority is certainly open to question. See Supplemental Brief of the Petitioner, pp. 19-20. Certainly

it cannot be claimed that the State of Wisconsin is now endowed with the wardship which was so effectively terminated by Congress.

On p. 4 of its Supplemental Brief, the government implies that an Indian treaty is somehow paramount to federal statutes. This is not so.<sup>12</sup>

The government's brief refers in several places to "the reservation," "The Tribe," "the lands of the tribe," "Indian lands," etc. As we have stated, the lands are now in private ownership, are taxed by the state, and the reservation no longer exists. There are no more "communally held" lands—the only lands to which the government would extend the treaty rights.

### III. THE STATE OF WISCONSIN HAS A SOVEREIGN INTEREST IN THE REGULATION OF HUNTING AND FISHING WHICH CANNOT BE TAKEN AWAY BY CONGRESSIONAL IMPLICATION AND GIVEN TO A PRIVATE ENTITY.

Wisconsin law has long recognized the proposition that title to all fish and game within its borders is held by the state, in its sovereign capacity, for the benefit of all its people. *Krenz v. Nichols* (1928), 197 Wis. 394, 222 N. W. 300; *State v. Lipinske* (1933), 212 Wis. 421, 424-5, 249 N. W. 289. See also *La Coste v. Louisiana* (1923), 263 U. S. 545, 44 S. Ct. 186, 68 L. Ed. 437. Similarly, the State of Wisconsin, by virtue of the Northwest Ordinance of 1787 and Sec. 1, Art. IX, of its own constitution, holds all rights incidental to public use of navigable waters—which includes hunting and fishing uses—in trust for all the people. *Nekoosa-*

<sup>12</sup>See our opening brief on reargument, pp. 8-9



*Edwards Paper Co. v. Railroad Comm.* (1930), 201 Wis. 40, 48, 228 N. W. 144, 229 N. W. 631, Affirmed 283 U. S. 787; *Muench v. Public Service Commission* (1952), 261 Wis. 492, 499-502, 507-508, 53 N. W. (2d) 514, 55 N. W. (2d) 40.

The regulation of hunting and fishing is an attribute of sovereignty and is also a duty imposed upon the State of Wisconsin as trustee of the waters, fish and wildlife within its borders. *LeClair v. Swift* (D. C. Wis. 1948), 76 F. Supp. 729. All citizens of Wisconsin, as beneficiaries of this trust, have rights in the state's wildlife resources.

In addition, the State of Wisconsin was admitted to the Union in 1848 on an equal footing with all other states. This is contrary to any notion that Congress intended to admit the State of Wisconsin with diminished sovereignty insofar as authority over its lands, waters and wildlife is concerned. See *Ward v. Race Horse* (1896), 163 U. S. 504, 515-516, 16 S. Ct. 1076, 41 L. Ed. 244.

This trust attribute of sovereignty attached to the lands (and waters) in question prior to the 1854 Treaty, as did the sovereign right of the state, in the exercise of its police power, to make all reasonable regulations for the preservation of fish and game within its borders. *State v. Nergaard* (1905), 124 Wis. 414, 420, 102 N. W. 899.

The navigable waters trust doctrine, having its basis in the Northwest Ordinance, is peculiar to the states forming the Northwest Territory, and is not recognized in many Western states where some of the cases discussed by the petitioner arose.

Moreover, the State of Wisconsin has never surrendered its sovereignty over Indian lands. Many other states—including Washington, Oklahoma, Utah, Arizona, New Mexi-

co, Idaho, North Dakota and South Dakota—adopted constitutions which expressly relinquished state jurisdiction over Indian lands.<sup>13</sup> Wisconsin's constitution contains no such provision.<sup>14</sup> Similarly, the act admitting Wisconsin to the Union<sup>15</sup> is silent on the preservation of Indian rights, whereas the Alaska,<sup>16</sup> Washington, Montana, North Dakota and South Dakota<sup>17</sup> statehood and enabling acts contain express declinations of jurisdiction over Indian property and certain Indian rights.

During the period of federal trusteeship over the land and people of the Menominee Tribe (1854-1961) the federal government, as owner of the land and guardian of the people, stood between the state and the Indian "wards". The sovereignty of the state was not surrendered during this period. The exclusion of state jurisdiction was more in the nature of a prohibition against trespassing on the reservation for the purpose of enforcing the fish and game laws. By passage of the Termination Act, Congress has completely abolished its role as trustee and guardian, and has returned both the reservation land and the Menominee people to full citizenship status. The state sovereignty is now complete and unimpaired.

What the petitioner (and the government) are saying is that the Termination Act, without so stating, has vested this sovereign power in a private corporation subse-

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<sup>13</sup>Washington Constitution, Art. XXVI, Oklahoma Constitution, Art. I, sec. 3; Utah Constitution, Art. III, sec. 1; Arizona Constitution, Art. XX, sec. 4; New Mexico Constitution, Art. XXI, sec. 2; Idaho Constitution, Art. XXI, sec. 19; North Dakota Constitution, Art. XVI, sec. 203; South Dakota Constitution, Art. XX.

<sup>14</sup>See Wisconsin Constitution, Arts. II and IX.

<sup>15</sup>9 Stat. 283

<sup>16</sup>72 Stat. 339

<sup>17</sup>A single enabling act, 25 Stat. 676, applied to Washington, Montana, North Dakota and South Dakota.

quently formed by private citizens. We most firmly disagree with such a contention, and respectfully urge this court to reverse the judgment of the Court of Claims.

Respectfully submitted,

BRONSON C. LA FOLLETTE

*Attorney General  
State of Wisconsin*

WILLIAM F. EICH

*Assistant Attorney General  
State of Wisconsin*

*Attorneys for State of Wisconsin*

## ARTICLES OF INCORPORATION

Executed by the undersigned for the purpose of forming a Wisconsin corporation under Chapter 181 of the Wisconsin statutes, WITHOUT STOCK AND NOT FOR PROFIT.

Article 1. The name of the corporation shall be Menominee Indian Tribe of Wisconsin, Inc.

Article 2. The period of existence shall be ten (10) years.

Article 3. The purposes shall be to promote a better understanding and relationship with our fellow citizens of Wisconsin; to re-establish the Menominee Indian Tribe of Wisconsin; to preserve their identity; to protect and preserve tribal customs, traditions, cultures, legends, language and crafts; to reserve such other inherent rights from former Menominee treaties or agreements with the United States; to promote the common welfare of the Menominee Indian Tribe and its members and for other purposes consistent with law, and to foster the continued loyalty and allegiance of the Menominee Indian Tribe to the United States and the flag of our country, to these objectives, we dedicate this organization.

Article 4. Location of the principal office Neopit, Menominee County, Wisconsin.

Article 5. Name of the initial registered agent Atlee A. Dodge.

Article 6. Address of the initial registered agent Neopit, Menominee County, Wisconsin.

Article 7. The number of directors may be fixed by by-law but shall be not less than three. The number of direc-

tors (Council of Chiefs) shall consist of twelve (12) members.

Article 8. The number of directors constituting the initial board shall be 12. . . .

Article 9. Names and addresses of the initial directors:

Al Frechette, Neopit, Wisconsin  
 Atlee A. Dodge, Neopit, Wisconsin  
 Gordon Dickie, Keshena, Wisconsin  
 Al Dodge, Neopit, Wisconsin  
 Lawrence Richmond Jr., Neopit, Wisconsin  
 James G. Frechette, Keshena, Wisconsin  
 Glenn Besaw, Neopit, Wisconsin  
 Lawrence Richmond Sr., Neopit, Wisconsin  
 George Kenote, Neopit, Wisconsin  
 Hilary Waukau, Neopit, Wisconsin  
 John M. Boyd, Keshena, Wisconsin  
 Melvin Chevalier, Neopit, Wisconsin

Article 10. (Membership provisions)

SECTION 1. Memberships shall consist of four categories:

a. Menominee Indian Membership. All Menominee Indians appearing on the final roll of the Menominee Indian Tribe which was approved by the Secretary of the Interior under date of November 26, 1957 *shall be eligible for membership*; provided, that no tribal member under 21 years of age shall vote in the organization.

b. Associate membership of Menominee Descendants. Any person or persons, descendants of enrolled Menominee Indians or persons recipients through inheritance of Menominee Enterprises, Inc., securities shall be eligible as associate members, with non-voting status.



c. Associate membership of persons married to enrolled Menominees. Any person married to an enrolled member of the Menominee Tribe shall be eligible as associate members with non-voting status.

d. Associate membership of non-Indians. Non-Indian applicants may be admitted to non-voting associate membership upon the consideration and recommendation of the Membership Committee with final approval by the majority vote of the membership assembled at the Annual Menominee Indian Tribal Convention.

SECTION 2. Elective Membership. All members of the Menominee Indian Tribe are eligible to join the organization of their own choice and voting membership and any other rules shall be prescribed in the By-laws.

SECTION 3. Resignation. A member may at any time file his or her resignation with the Recording Secretary, such must be in writing which shall become effective as of date filed.

SECTION 4. Expulsion and Re-instatement of Members. The Council of Chiefs may suspend or expel any member for cause, after an appropriate hearing before such body and in such manner as the Council of Chiefs shall direct. Any member so suspended or expelled may be reinstated in good standing by the affirmative vote of a majority of the members of the Council of Chiefs. (Other features relating to dues embodied in By-laws)

Article 11. (Other provisions)

ARTICLE XI—The Menominee Indian Tribe of Wisconsin, Inc., shall not engage in nor lend itself to partisan political activity.

Article 12. The name and address of incorporator (or incorporators) are:

NAME	ADDRESS
Atlee A. Dodge	Neopit, Wisconsin
Al Frechette	Neopit, Wisconsin
Gordon Dickie	Keshena, Wisconsin
Glenn Besaw	Neopit, Wisconsin

Article 13. These articles may be amended in the manner authorized by law at the time of amendment.

Executed in duplicate on the 9th day of May, 1962.

ATLEE A. DODGE

AL FRECHETTE

GORDON DICKIE

GLENN BESAW

STATE OF  
County of

} ss.

Personally came before me this 9th day of May A. D. 1962 the above named Atlee A. Dodge, Al Frechette, Gordon Dickie and Glenn Besaw to me known to be the persons who executed the foregoing instrument, and acknowledged the same.

DELORES NINHAM  
Notary Public  
Menominee County

My Commission expires 2/16/64

(Notarial Seal)

# SUPREME COURT OF THE UNITED STATES

No. 187.—OCTOBER TERM, 1967.

Menominee Tribe of Indians, Petitioner, v. United States.	}	On Writ of Certiorari to the United States Court of Claims.
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[May 27, 1968.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Menominee Tribe of Indians was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854. 10 Stat. 1064. By this treaty the Menominees retroceded certain lands they had acquired under an earlier treaty and the United States confirmed to them the Wolf River Reservation "for a home, to be held as Indian lands are held." Nothing was said in the 1854 treaty about hunting and fishing rights. Yet we agree with the Court of Claims<sup>1</sup> that the language "to be held as Indian lands are held" includes the right to fish and to hunt. The record shows that the lands covered by the Wolf River Treaty of 1854 were selected precisely because they had an abundance of game. See *Menominee Tribe v. United States*, 95 Ct. Cl. 232, 240-241 (1941). The essence of the Treaty of Wolf River was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.<sup>2</sup>

<sup>1</sup> *Menominee Tribe v. United States*, 179 Ct. Cl. 496, 503-504.

<sup>2</sup> As stated by the Supreme Court of Wisconsin:

"It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them

## 2 MENOMINEE TRIBE v. UNITED STATES.

What the precise nature and extent of those hunting and fishing rights were we need not at this time determine. For the issue tendered by the present decision of the Court of Claims, 179 Ct. Cl. 496, is whether those rights, whatever their precise extent, have been extinguished.

That issue arose because, beginning in 1962, Wisconsin took the position that the Menominees were subject to her hunting and fishing regulations. Wisconsin prosecuted three Menominees for violating those regulations and the Wisconsin Supreme Court held<sup>3</sup> that the state regulations were valid, as the hunting and fishing rights of the Menominees had been abrogated by Congress in

when these other lands were ceded to them 'to be held as Indian lands are held.' Construing this ambiguous provision of the 1854 Treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty." *State v. Sanapaw*, 21 Wis. 2d 377, 383, 124 N. W. 2d 41, 44 (1963).

The Court said in *United States v. Winans*, 198 U. S. 371, 380-381, "We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.'"

As the Solicitor General points out in his brief, the words "to be held as Indian lands are held" sums up in a single phrase the familiar provisions of earlier treaties which recognized hunting and fishing as normal incidents of Indian life. See Treaty of January 3, 1786, with the Choctaws, 7 Stat. 21, 22; Treaty of January 31, 1786, with the Shawnees, 7 Stat. 26, 27; Treaty of January 9, 1789, with the Wyandots, 7 Stat. 28, 29; Treaty of August 3, 1795, with the Wyandots, 7 Stat. 49, 52; Treaty of November 10, 1808, with the Osages, 7 Stat. 107, 109; Treaty of August 24, 1835, with the Comanches, 7 Stat. 474, 475.

<sup>3</sup> *State v. Sanapaw*, 21 Wis. 2d 377, 124 N. W. 2d 41.

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the Menominee Termination Act of 1954. 68 Stat. 250, as amended, 25 U. S. C. §§ 891-902 (1964).

Thereupon the tribe brought suit in the Court of Claims against the United States to recover just compensation for the loss of those hunting and fishing rights.<sup>4</sup> The Court of Claims by a divided vote held that the tribe possessed hunting and fishing rights under the Wolf River Treaty; but it held, contrary to the Wisconsin Supreme Court, that those rights were not abrogated by the Termination Act of 1954. We granted the petition for a writ of certiorari in order to resolve that conflict between the two courts. 389 U. S. 811. On oral argument both petitioner and respondent urged that the judgment of the Court of Claims be affirmed. The State of Wisconsin appeared as *amicus curiae* and argued that that judgment be reversed.

In 1953 Congress by concurrent resolution<sup>5</sup> instructed the Secretary of the Interior to recommend legislation for the withdrawal of federal supervision over certain American Indian tribes, including the Menominees. Several bills were offered, one for the Menominee Tribe that expressly preserved hunting and fishing rights.<sup>6</sup> But the one that became the Termination Act of 1954, viz. H. R. 2828, did not mention hunting and fishing rights. Moreover, counsel for the Menominees spoke against the bill, arguing that its silence would by implication abolish those hunting and fishing rights.<sup>7</sup> It is therefore argued that they were abolished by the Termination Act.

The purpose of the 1954 Act was by its terms "to provide for orderly termination of federal supervision over

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<sup>4</sup> See *Shoshone Tribe v. United States*, 299 U. S. 476.

<sup>5</sup> H. R. Conc. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132.

<sup>6</sup> S. 2813 and H. R. 7135, 83d Cong., 2d Sess.

<sup>7</sup> Joint Hearings, Subcommittee of Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., on S. 2813, H. R. 2828, and H. R. 7135, pp. 697, 704.



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the property and members" of the tribe. Under its provisions, the tribe was to formulate a plan for future control of tribal property and service functions theretofore conducted by the United States. On or before April 30, 1961, the Secretary was to transfer to a tribal corporation or to a trustee chosen by him all property real and personal held in trust for the tribe by the United States.<sup>8</sup>

The Menominees submitted a plan, looking toward the creation of a county in Wisconsin out of the former reservation and the creation by the Indians of a Wisconsin corporation to hold other property of the tribe and its members. The Secretary of the Interior approved the plan<sup>9</sup> with modifications; the Menominee Indian Tribe of Wisconsin, Inc., was incorporated;<sup>10</sup> and

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<sup>8</sup> The Termination Act also provided for a closing of the membership roll of the tribe with distribution to the enrollees of certificates of beneficial interest in the tribal property. The roll was closed in December 1957. 22 Fed. Reg. 9951.

<sup>9</sup> 26 Fed. Reg. 3726.

<sup>10</sup> Wisconsin questions whether Menominee Enterprises, Inc., to which all tribal assets were conveyed pursuant to the termination plan (26 Fed. Reg. 3726), should be viewed as the successor entity to the tribe and the present holder of the hunting and fishing rights, and if so, to what extent the corporation or the tribal members hereof can withhold or parcel out these rights.

The Articles of Incorporation of Menominee Enterprises provide for four categories of memberships (Article X): Menominee Indian membership (§ 1 (a)) (all Menominee Indians appearing on the final roll of the tribe approved by the Secretary of the Interior, n. 8, *supra*); Associate membership of Menominee Descendants (§ 1 (b)) (any descendant of enrolled Menominee Indians or recipients through inheritance of Menominee Enterprises securities); Associate membership of persons married to enrolled Menominees (§ 1 (c)); and Associate membership of non-Indians (§ 1 (d)). In March 1968, the first category was enlarged by amendment of Art. X, § 1 (a), of the Articles of Incorporation to include all descendants of enrolled Menominee Indians with at least one-quarter Menominee blood, one or both of whose parents resided on the Menominee Reservation at the time of the descendant's birth. The corporation

numerous ancillary laws were passed by Wisconsin integrating the former reservation into its county system of government. The Termination Act provided that after the transfer by the Secretary of title to the property of the tribe, all federal supervision was to end and "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction."

It is therefore argued with force that the Termination Act of 1954, which became fully effective in 1961, submitted the hunting and fishing rights of the Indians to state regulation and control. We reach, however, the opposite conclusion. The same Congress that passed the Termination Act also passed Public Law 280, 67 Stat. 588, as amended, 18 U. S. C. § 1162. The latter came out of the same committees of the Senate and the House as did the Termination Act; and it was amended<sup>11</sup> in a

also adopted a resolution defining those persons entitled to exercise the hunting and fishing rights, which provided:

"All tribal members, as defined in Article X of the Articles of Incorporation, Section 1 (a), and only such members, shall have the right to exercise tribal hunting and fishing rights, subject to tribal regulations;

"PROVIDED, HOWEVER, that any member who violates any tribal hunting or fishing regulation may upon finding of the Council of Chiefs be declared ineligible to exercise such rights, for such period of time as the Council of Chiefs may specify."

We believe it inappropriate, however, to resolve the question of who the beneficiaries of the hunting and fishing rights may be; and we expressly reserve decision on it. Neither it nor the nature of those rights nor the extent, if any, to which Wisconsin may regulate them have been fully briefed and argued by the parties either in the Court of Claims or in this Court, and the posture of the present litigation does not require their resolution.

<sup>11</sup> As originally enacted Public Law 280 exempted the Menominees from its provisions. The House Reports on Pub. L. 280 (H. R. 1063, 83d Cong., 1st Sess.) and on Pub. L. 661 (H. R. 9821, 83d Cong., 2d Sess.) indicate that the Menominees had specifically asked for ex-


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way that is critical here only two months after the Termination Act became the law. As amended, Public Law 280 granted designated States, including Wisconsin, jurisdiction "over offenses committed by or against Indians in the areas of Indian country" named in the Act, which in the case of Wisconsin was described as "All Indian country within the State." But Public Law 280 went on to say that "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing* or the control, licensing, or regulation thereof." (Italics added.) That provision on its face contains no limitation; it protects any hunting, trapping, or fishing right granted by a federal treaty. Public Law 280, as amended, became the law in 1954, nearly seven years *before* the Termination Act became fully effective in 1961. In 1954, when Public Law 280 became effective, the Menominee Reservation was still "Indian country" within the meaning of Public Law 280.

Public Law 280 must therefore be considered *in pari materia* with the Termination Act. The two Acts read together mean to us that, although federal supervision of the tribe was to cease and all tribal property was to be

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emption from the provisions of the bill that eventually became Pub. L. 280, on the ground that their tribal law and order program was functioning satisfactorily. Subsequently, the tribe reconsidered its position and sponsored H. R. 9821, amending Pub. L. 280 to extend its provisions to the Menominee Reservation. The Department of the Interior recommended favorable action on the proposed amendment, and the amendment was enacted into law on August 24, 1954 (68 Stat. 795), two months after the passage of the Menominee Termination Act. See H. R. Rep. No. 848, 83d Cong., 1st Sess., 6 (1953); H. R. Rep. No. 2322, 83d Cong., 2d Sess. (1954).



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transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854<sup>12</sup> survived the Termination Act of 1954.

<sup>12</sup> The Act creating the Wisconsin Territory (5 Stat. 10) contained an express reservation of Indian rights, though both the Enabling Act of 1846 (9 Stat. 56), and the Act admitting Wisconsin to the Union in 1848 (9 Stat. 233) were silent on the subject. It was only a few months after Wisconsin achieved statehood that the Menominees ceded all of their Wisconsin lands to the United States in anticipation of the tribe's removal to other lands west of the Mississippi. Treaty of October 18, 1948, 9 Stat. 952. But as already noted, this removal never fully succeeded, and the Menominee Reservation created by the Treaty of Wolf River was carved out of the lands the Indians had previously ceded to the United States.

The State argues that since it was admitted into the Union on an equal footing with the original States, its sovereignty over the lands designated in 1854 as the Menominee Reservation attached in some degree between the time the Indians ceded all of their Wisconsin lands to the United States in 1848 and the time when the United States ceded back a certain portion of those lands for the reservation in 1854. Wisconsin contends that any hunting or fishing privileges guaranteed the Menominees free from state regulation did not survive the dissolution of the reservation and the termination of the trusteeship of the United States over the Menominees. At that time, it is said, Wisconsin's long dormant power to exercise jurisdiction over those reservation lands was awakened by the termination of the reservation.

If any hiatus in title to the reservation lands in question occurred between 1848 and 1854, any jurisdiction that the State may have acquired over those would not have survived the Treaty of 1854. The Treaty of Wolf River was, under Article VI of the Constitution, the "supreme law of the land," and the exercise of rights on reservation lands guaranteed to the tribe by the Federal Government would not be subject to state regulation, at least in absence of a cession by Congress. Cf. *Ward v. Race Horse*, 163 U. S. 504, 514. In this connection it should be noted that in 1853 the Wisconsin Legislature consented to the establishment of the Menominee Reservation subsequently confirmed by the 1854 Treaty (1853 Wis. Jt. Res., c. I),

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This construction is in accord with the overall legislative plan. The Termination Act by its terms provided for the "orderly termination of Federal supervision over the property and members" of the tribe, 25 U. S. C. § 891. (Emphasis added.) The Federal Government ceded to the State of Wisconsin its power of supervision over the tribe and the reservation lands, as evident from the provision of the Termination Act that the laws of Wisconsin "shall apply to the tribe and its members as they apply to other citizens or persons within [its] jurisdiction."

The provision of the Termination Act (25 U. S. C. § 899) that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to members of the tribe" plainly refers to the termination of federal supervision. The use of the word "statutes" is potent evidence that no *treaty* was in mind.

We decline to construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists (see *Lone Wolf v. Hitchcock*, 187 U. S. 553, 564-567) "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Co. v. Cox Co.*, 291 U. S. 138, 160. See also *Squire v. Dapoe*, 351 U. S. 1.

Our conclusion is buttressed by the remarks of the legislator chiefly responsible for guiding the Termination Act to enactment, Senator Watkins, who stated upon the occasion of the signing of the bill that it "in no way violates any treaty obligation with this tribe."<sup>13</sup>

We find it difficult to believe that Congress, without explicit statement, would subject the United States to

an action which can be fairly construed as a disclaimer of any jurisdiction the State may have possessed.

<sup>13</sup> 100 Cong. Rec. 8538.



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a claim for compensation.<sup>14</sup> by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations toward the Indians.<sup>15</sup>

Accordingly the judgment of the Court of Claims is

*Affirmed.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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<sup>14</sup> See n. 4, *supra*.

<sup>15</sup> Compare the hearings on the Klamath Termination bill, which took place shortly before the Menominee bills were reached, in which Senator Watkins expressed the view that perhaps the Government should "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. See Joint Hearings, Subcommittees of the Committees on Interior and Insular Affairs, 83d Cong., 2d Sess., on S. 2745 and H. R. 7320, pp. 254-255.

# SUPREME COURT OF THE UNITED STATES

No. 187.—OCTOBER TERM, 1967.

Menominee Tribe of Indians, Petitioner, v. United States.	}	On Writ of Certiorari to the United States Court of Claims.
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[May 27, 1968.]

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK joins, dissenting.

By the Treaty of Wolf River in 1854, 10 Stat. 1064, the United States granted to the Menominee Tribe of Indians a reservation "to be held as Indian lands are held." As the Court says, this language unquestionably conferred special hunting and fishing rights within the boundaries of the reservation. One hundred years later, in the Menominee Termination Act, 68 Stat. 250, 25 U. S. C. §§ 891-902, Congress provided for the termination of the reservation and the transfer of title to a tribal corporation. The Act provided that upon termination of the reservation,

"[T]he laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 25 U. S. C. § 899.<sup>1</sup>

The reservation was formally terminated on April 30, 1961, seven years after the Termination Act, and the

<sup>1</sup> The Termination Act was adopted in response to an earlier joint Congressional resolution which stated in part:

"[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . . ." 67 Stat. B132.

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State of Wisconsin has ever since subjected the Menominees, just as any other citizens, to its hunting and fishing regulations. *State v. Sanapaw*, 21 Wis. 2d 377, 124 N. W. 2d 41.

The Menominees instituted this proceeding against the United States, asking compensation for the taking of their special rights. *Shoshone Tribe v. United States*, 299 U. S. 476. The Court of Claims denied compensation on the ground that the Termination Act had not in fact extinguished those rights, and that they remained immune from regulation by Wisconsin. The Court today agrees. I do not.

The statute is plain on its face: after termination the Menominees are fully subject to state laws just as other citizens are, and no exception is made for hunting and fishing laws. Nor does the legislative history contain any indication that Congress intended to say anything other than what the unqualified words of the statute express.<sup>2</sup> In fact two bills which would have explicitly preserved hunting and fishing rights<sup>3</sup> were rejected in favor of the bill ultimately adopted<sup>4</sup>—a bill which was opposed by counsel for the Menominees because it failed to preserve their treaty rights.<sup>5</sup>

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<sup>2</sup> I cannot attach any significant weight to an offhand remark in a speech made by one Senator after the enactment of the bill. *Ante*, at —.

It is, of course, irrelevant that the legislative history reveals no intention by the Congress to incur a financial obligation to the Menominees. If what the Congress did took away the Menominees' property rights, then regardless of congressional intent they are entitled to compensation from the United States for the taking.

<sup>3</sup> H. R. 7135 and S. 2813, 83d Cong., 2d Sess.

<sup>4</sup> H. R. 2828, 83d Cong., 2d Sess.

<sup>5</sup> "I think it is clear that [the bill] does affect those treaty rights and that those treaties are abrogated. Certainly it abolishes the tribal right to exclusive hunting and fishing privileges, because automatically upon the final termination date, the Menominee Res-

The Court today holds that the Termination Act does not mean what it says. The Court's reason for reaching this remarkable result is that it finds "*in pari materia*" another statute which, I submit, has nothing whatever to do with this case.

That statute, Public Law 280, 67 Stat. 588, as amended, 68 Stat. 795, 18 U. S. C. § 1162 and 28 U. S. C. § 1360, granted to certain States, including Wisconsin, general jurisdiction over "Indian country" within their boundaries.<sup>6</sup> Several exceptions to the general grant were enumerated, including an exception from the grant of criminal jurisdiction for treaty-based hunting and fishing rights. 18 U. S. C. § 1162 (b). But this case does not deal with state jurisdiction over Indian country; it deals with state jurisdiction over Indians after Indian country has been terminated. Whereas Public Law 280 provides for the continuation of the special hunting and fishing rights while a reservation exists, the Termination Act provides for the applicability of all state laws without exception after the reservation has disappeared.<sup>7</sup>

ervation so far as hunting and fishing is concerned, would become subject to the laws of Wisconsin." Joint Hearings on S. 2813, H. R. 2828, and H. R. 7135, Subcommittee of Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., 692, 708.

<sup>6</sup> "Indian country" is defined in 18 U. S. C. § 1151 as land within Indian reservations, dependent Indian communities, and Indian allotments.

Public Law 280 as originally enacted in 1953, 67 Stat. 588, did not include the Menominee reservation. In 1954 the statute was amended to include that reservation. 68 Stat. 795. From that time until the reservation was terminated in 1961, Public Law 280 governed the extent to which the State could assert jurisdiction over the Menominees on their reservation.

<sup>7</sup> The only real relevance of Public Law 280 lies in its demonstration that when Congress wants to except treaty rights from jurisdictional grants, it knows how to do so. Cf. Klamath Termination Act, 68 Stat. 718, 25 U. S. C. § 564 *et seq.*, enacted by the same Congress that enacted the Menominee Termination Act, which explicitly preserves fishing rights. 25 U. S. C. § 564m (b).

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The Termination Act by its very terms provides:

"[A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe . . . ." 25 U. S. C. § 899.

Public Law 280 is such a statute. It has no application to the Menominees now that their reservation is gone.<sup>8</sup>

The 1854 Treaty granted the Menominees special hunting and fishing rights. The 1954 Termination Act, by subjecting the Menominees without exception to state law, took away those rights. The Menominees are entitled to compensation.

I would reverse the judgment of the Court of Claims.

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<sup>8</sup> If, as the Court seems to say, the exceptions enumerated in Public Law 280 continue in effect after termination of Indian country, it follows that Wisconsin cannot now tax, or otherwise regulate the use of, property owned by the Menominees. 18 U. S. C. § 1162 (b); 28 U. S. C. § 1360 (b). Cf. *Snohomish County v. Seattle Disposal Co.*, 425 P. 2d 22 (Wash. S. Ct.), holding that Public Law 280 prohibits zoning regulation of a garbage dump on reservation land leased to non-Indians. Certiorari was denied, 389 U. S. 1016, Mr. JUSTICE DOUGLAS, joined by Mr. JUSTICE WHITE, dissenting.



